ECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Brian Wolfman
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
1660 Lincoln Street
Suite 2220
Denver, CO 80264
(303) 830-7090
robinson@sprlaw.net

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Endrew F. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 798 F.3d 1329. The opinion of the United States District Court for the District of Colorado (Pet. App. 27a) is unpublished but is available at 2014 WL 4548439. The opinion of the State of Colorado Office of Administrative Courts (Pet. App. 59a) is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 25, 2015. Pet. App. 1a. Petitioner's request for rehearing and rehearing en banc was denied on September 24, 2015. Pet. App. 86a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education." 20 U.S.C. § 1401(9). These special education services must be "provided in conformity with the individualized education program required under" the IDEA. *Id.*

STATEMENT OF THE CASE

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, public schools must provide children with disabilities a "free appropriate public education." The key mechanism by which schools meet this requirement is the individualized education program, or IEP. Each IEP must be reasonably calculated to confer an educational benefit on the child. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

Since the Court first described this requirement over thirty years ago, federal courts of appeals have become intractably divided over the level of educational benefit the Act demands. Some courts, including the Tenth Circuit below, hold that an IEP satisfies the Act if it provides a child with a just-above-trivial educational benefit, while others hold that the Act requires a heightened educational benefit. Resolving the conflict among the circuits will ensure that millions of children with disabilities receive a consistent level of education, while providing parents and educators much-needed guidance regarding their rights and obligations.

A. Legal Background

1. In 1972, aware that children with disabilities often were not afforded access to public schools, Congress conducted an investigation. It found that most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (alteration in original) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see also* Edwin W. Martin et al., *The*

Legislative and Litigation History of Special Education, The Future of Children (Spring 1996), at 25, 26-28.

As a result, in 1975, Congress passed the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). It later amended and renamed the law the Individuals with Disabilities Education Act (IDEA or "the Act"). Pub. L. No. 101-476, 104 Stat. 1103 (1990). Since then, Congress has amended and reauthorized the IDEA twice – in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

Under the Act, states provide children with disabilities a free appropriate public education (FAPE) in exchange for federal funds for special education programs. *Rowley*, 458 U.S. at 775.[1] To provide a FAPE, parents and public school educators collaborate to create annual IEPs "tailored to the unique needs" of each child with a disability. *Id.* at 181; *see also* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327.

Congress recognized, however, that "this cooperative approach would not always produce a

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[1] The Act defines a "free appropriate public education" as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9).

consensus." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). To resolve disputes, the IDEA authorizes administrative and judicial review. 20 U.S.C. § 1415(f), (i)(2)(A). Either the school district or the child's parents may request a "due process hearing" and present the dispute to a hearing officer at a local or state education agency. 20 U.S.C. § 1415(f)(1)(A); *see Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005). The hearing officer then decides whether the school district has met the Act's requirements, including whether it has provided the student with a FAPE. 20 U.S.C. § 1415(b)(6), (f)(1)(A).

An aggrieved party may seek review of the agency decision in state or federal court, which "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). When parents place their child in a private school at their expense, the IDEA entitles the parents to tuition reimbursement if the school district has failed to provide a FAPE and the private school provides the child with an education that is proper under the Act. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *see* 20 U.S.C. § 1412(a)(10)(C)(ii).

2. a. This Court first examined the Act in 1982 in *Rowley*, 458 U.S. 176. There, the Court held that, to provide a FAPE, the Act does not require schools to maximize the potential of children with disabilities, *id.* at 189-90, because Congress had not intended to achieve "strict equality of opportunity or services" between children with and without disabilities, *id.* at 198. At the same time, the Court recognized that a child's IEP must be reasonably calculated to enable the child to receive educational benefit, *id.*

at 206-07, and thus acknowledged that an education that confers no educational benefit on children with disabilities could not fulfill the Act's goal of affording them access to public schools. But the Court expressly declined to specify what the level of benefit should be. *Id.* at 202.

b. Since *Rowley*, Congress has amended and reauthorized the IDEA twice – in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The 1997 amendments elevated the IDEA's goals from guaranteeing access to public education to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In service of these goals, the amendments added specific requirements for schools, such as the inclusion of students with disabilities in statewide educational assessments. *Id.* § 1412(a)(16). The previous version of the Act, Congress explained, had been "successful in ensuring children with disabilities . . . access to a free appropriate public education." *Id.* § 1400(c)(3). Yet implementation had been "impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Id.* § 1400(c)(4). Thus, the 1997 amendments sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)).

The 2004 amendments further increased goals for educating children with disabilities by requiring,

for example, that IEPs describe services for children over age fifteen that assist them in transitioning to post-secondary education, employment, and – as appropriate – independent living. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

B. Factual Background

Petitioner Endrew F. (Drew) was diagnosed at age two with autism, Pet. App. 3a, which affects eight percent of all children served by the IDEA.[2] Autism impairs Drew's "cognitive functioning, language and reading skills, and his social and adaptive abilities." *Id.* Because autism is one of the disabilities categorically covered by the IDEA, Drew is entitled to the Act's protections. 20 U.S.C. § 1401(3)(A).

Drew attended public school in respondent Douglas County (Colorado) School District from preschool through fourth grade and received an IEP from the school district each year. Pet. App. 3a-4a. In second and third grade, Drew began experiencing behavioral problems in school, such as yelling, crying, and dropping to the floor. *Id.* 63a-64a. These problems became more frequent and severe in fourth grade. *Id.* 66a-67a. Drew engaged in self-harming behaviors, such as head banging, and he regularly had to be removed from the classroom. *Id.* 61a, 66a. On at least two occasions, he ran away from school, and when he returned, he grew so agitated that he took off his clothing. *Id.* 66a-67a.

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[2] Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA* (2013), http://1.usa.gov/14ddX3M.

The parties agree that Drew's "behavioral issues interfered with his ability to learn." Pet. App. 56a, 73a. And the district court recognized the school district's "inability to manage [his] escalating behavioral issues." *Id.* 58a. Moreover, Drew made "minimal progress" towards the goals listed on his fourth-grade IEP. *Id.* 49a. For example, that IEP stated that Drew "will learn his multiplication facts 6-10," which was updated in his proposed fifth-grade IEP to "he will learn his multiplication facts 6-12." *Id.* 50a.

Following Drew's behavioral deterioration and lack of academic progress, his parents rejected the IEP proposed for his fifth-grade year because it was mostly unchanged from the ineffective fourth-grade IEP. Pet. App. 4a, 15a. Given the school's failure to address Drew's needs, his parents notified the school district that they were withdrawing him from the public school and would be seeking tuition reimbursement. *Id.* 68a-69a. They then placed Drew in a private school that specializes in educating children with autism. *Id.* 4a. The parties agree that Drew's placement at his new school was appropriate under the Act, *id.* 5a, and that he has made "academic, social and behavioral progress" there, *id.* 29a.

C. Proceedings Below

1. Drew's parents filed a due process complaint in 2012 seeking reimbursement for the tuition at his new school. Pet. App. 59a-60a. They maintained that the IEP for Drew's fifth-grade year denied him a FAPE because it was not reasonably calculated to provide him with an educational benefit. *Id.* 15a, 76a. They pointed to his behavioral decline and to

the IEP itself, which included objectives very similar to those in past IEPs, on which he had made "little to no progress." *Id.* Reasoning that the IDEA is only "designed to provide a floor" of educational quality, *id.* 77a, the hearing officer determined that the school district had provided Drew with a FAPE because he had received "some" educational benefit while enrolled in the public school, *id.* 72a.

2. Drew's parents filed suit under the IDEA in the U.S. District Court for the District of Colorado, basing jurisdiction on 20 U.S.C. § 1415(i)(2)(A) and 28 U.S.C. § 1331. The district court agreed with the hearing officer. Pet. App. 27a-28a. The court reasoned that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* 36a. The court thus found that because the administrative record showed some evidence of "minimal progress" on some of Drew's IEP goals, the school district had provided Drew a FAPE. *Id.* 49a.

The Tenth Circuit affirmed. In addressing the level of educational benefit required for a FAPE, Pet. App. 15a, the court held that an IEP must be reasonably calculated to guarantee "some" educational benefit, which it interpreted to be any educational benefit that is "more than *de minimis*," *id.* 16a (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009)). The Tenth Circuit acknowledged that "[s]everal circuits have adopted a higher standard." Pet. App. 17a. But it expressly rejected those holdings, reasoning that this Court's decision in *Rowley* required a lower standard.

Id. 16a-17a. In the Tenth Circuit's view, *Rowley*'s use of the phrase "some educational benefit" to describe what the IDEA requires pinpointed the precise level of benefit required, rather than simply serving as a placeholder for the issue the Court expressly declined to reach: "establish[ing] any one test for determining the adequacy of educational benefits." 458 U.S. at 202.

Applying its "more than *de minimis*" test to the facts here, the Tenth Circuit observed that this was "without question a close case." Pet. App. 23a. But the Tenth Circuit held that Drew's IEP was "substantively adequate" because he had made just-above-trivial academic progress. *Id.*

3. Petitioner sought rehearing and rehearing en banc. The Tenth Circuit denied these requests. Pet. App. 86a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are in disarray over the level of educational benefit that school districts must confer on children with disabilities to provide them with a free appropriate public education under the IDEA. This Court should use this case – which cleanly presents the legal issue on a well-developed set of facts – to resolve the conflict over this important question.

I. The Courts Of Appeals Are In Disarray Over The Level Of Educational Benefit That School Districts Must Provide Under The IDEA.

In *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), this Court expressly declined "to establish any one test for determining the adequacy of

educational benefits conferred." And while *Rowley* explained that Congress intended to confer "some educational benefit" on children with disabilities, *id.* at 200, it also explained that Congress intended to make "access meaningful," *id.* at 192. Lower courts have since latched on to the terms "some" and "meaningful" from *Rowley* to establish standards of educational benefit that conflict with one another.

Two circuits hold that IEPs must be calculated to confer on students with disabilities a substantial educational benefit, which they refer to as a "meaningful educational benefit." Five other circuits expressly acknowledge their disagreement with this higher standard and hold that *Rowley* requires only a just-above-trivial educational benefit. Three circuits appear to apply the just-above-trivial standard but have not expressly rejected the higher standard. The Ninth Circuit is internally conflicted, with different panels aligning themselves with opposite sides of the circuit split. The D.C. Circuit has not described the required level of benefit.

A. The Conflict

1. *Substantial Benefit.* For over twenty-five years, the Third Circuit consistently has held that IEPs must be calculated to provide a meaningful educational benefit to children with disabilities, explaining that to provide "merely more than a trivial educational benefit does not meet the meaningful benefit requirement." *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (internal quotation marks omitted); *accord T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 & n.2 (3d Cir. 2000) (Alito, J.) (expressly rejecting the "more than trivial benefit" standard); *Polk v. Cent. Susquehanna Intermediate*

Unit 16, 853 F.2d 171, 178-85 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

The Sixth Circuit expressly agrees with the Third Circuit that the IDEA requires a heightened educational benefit. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862-63 (6th Cir. 2004) (citing several Third Circuit cases), *cert. denied*, 546 U.S. 936 (2005). In *Deal*, the Sixth Circuit observed that "[n]othing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit," *id.* at 863, as long as that standard does not require schools to maximize each child's potential, *id.* at 862. It then went on to explain that, particularly in light of the 1997 amendments, the IDEA aims to enable children with disabilities "to lead productive, independent, adult lives, to the maximum extent possible." *Id.* at 864 (quoting 1997 version of the IDEA).[3] The Sixth Circuit thus adopted a standard demanding substantial educational progress because schools "providing no more than *some* educational benefit could not possibly hope to attain" Congress's goals. *Id.*

2. *Just-Above-Trivial Benefit.*

a. Five courts of appeals have expressly rejected a higher standard, as adopted by the Third and Sixth Circuits, and hold that, under the IDEA, school districts need only provide "some" educational benefit

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[3] This portion of the IDEA quoted in *Deal* now appears in substantially identical form in 20 U.S.C. § 1400(c)(5)(A)(ii).

– a standard met when an IEP is calculated to confer a just-above-trivial benefit.

The Tenth Circuit's decision below is illustrative. It held that "the educational benefit mandated by IDEA must merely be 'more than de minimis.'" Pet. App. 16a-17a (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009)); *see also Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). In so holding, it "explicitly rejected" the "Third Circuit's heightened 'meaningful benefit' standard." Pet. App. 19a.

The Fourth Circuit agrees. It recognizes that "[s]ome courts do explicitly hold that the IDEA as amended requires school districts to meet a heightened standard." *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) (citing *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008)). But the Fourth Circuit's own "standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial." *Id.* at 360.

The First Circuit likewise requires only that educational benefits be just above trivial. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *see also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23-24 (1st Cir. 2008). It has rejected the argument that the 1997 IDEA amendments raised the standard. *Lessard*, 518 F.3d at 27-28; *see also* Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After* Rowley*?*,

39 Suffolk U.L. Rev. 1, 14-15 (2005) (describing the First Circuit as "steadfastly refus[ing] to apply" the higher standard).

The Seventh and Eleventh Circuits have also expressly rejected the "more stringent test" that prevails in the Third and Sixth Circuits, *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002), and have held that a student who makes just more than trivial progress has received a FAPE. *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011); *see also JSK by and through JK v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991) (rejecting a heightened benefit standard and noting that "[w]hile a trifle might not represent adequate benefits," "some benefit" is all that is required) (internal quotation marks omitted)).

b. Three other courts of appeals appear to apply the just-above-trivial standard but without expressly rejecting a higher standard.

The Second Circuit holds that the IDEA is satisfied when an IEP is reasonably calculated to produce "more than only trivial advancement." *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008) (internal quotation marks omitted).

Although the Fifth Circuit has stated that "the educational benefit that an IEP is designed to achieve must be 'meaningful,'" *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (citing *Polk*, 853 F.2d at 182), *cert. denied*, 522 U.S. 1047 (1998), it has clarified that this simply precludes an IEP that would produce a "mere

modicum or *de minimis*" educational benefit. *Id.* (internal quotation marks omitted).

The Eighth Circuit likewise has held that a student who "enjoyed more than what [the court] would consider 'slight' or 'de minimis' academic progress" was not denied an educational benefit. *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011).

3. *Other Circuits.* The Ninth Circuit is internally conflicted, embracing different ends of the circuit split on different occasions. It has twice applied a heightened benefit standard. *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 852 (9th Cir. 2014); *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008). The Ninth Circuit in *Hellgate* expressly aligned itself with the Sixth Circuit, holding that the 1997 amendments enhanced schools' obligations under the Act by requiring them to do more than simply "open the door" to children with disabilities. 541 F.3d at 1212-13 & n.3 (quoting *Rowley*, 458 U.S. at 192). But in *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2009), the Ninth Circuit disagreed with *Hellgate* and adopted the lower standard, holding that Congress did not "abrogate[]" *Rowley* in 1997. *Id.* at 951 & nn.9-10; *accord Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1057 & n.2 (9th Cir. 2012).

The D.C. Circuit has not endorsed a specific level of benefit. Instead, it only echoes *Rowley*, holding that an IEP must be reasonably calculated to ensure "educational benefits." *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015); *see also Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015).

B. The Circuit Split Is Ripe For Resolution.

The question presented has had sufficient time to percolate in the forty years since the passage of the original Act and in the decades since the enactment of key amendments in 1997 and 2004. Nearly every court of appeals has weighed in on the issue.

The answer to the question presented depends in part on an interpretation of this Court's decision in *Rowley*, making it unlikely that lower courts will resolve their disagreement without guidance from this Court. Several courts have interpreted *Rowley* to prescribe a lower standard and have refused to hold – absent direction from this Court – that the IDEA requires more. *See, e.g.*, *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 358-60 (4th Cir. 2015); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27-28 (1st Cir. 2008).

Moreover, without this Court's intervention, the educational benefit to which a child with a disability is entitled will continue to depend on the state in which he or she lives. Now, for instance, a child with autism is entitled to only a just-above-trivial educational benefit in New York, which would be insufficient to satisfy the IDEA just across the border in the New Jersey suburbs of New York City.

II. The Question Presented Is Important To Students With Disabilities, Their Families, And Schools.

Parents and educators together create 6.5 million IEPs annually, and each of these IEPs must comport with the FAPE standard. Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA*

(2013), http://1.usa.gov/14ddX3M. To develop and administer these IEPs, all parties need certainty about their rights and obligations under the IDEA.

A. An Inconsistent Standard Is Untenable For All Parties.

Being the parent of a child with a disability involves serious emotional and practical challenges, and the process of developing an IEP is demanding. It involves collaboration to determine appropriate educational services, periodic student assessments, IEP team meetings, and, on occasion, dispute resolution. But every stage of the process is improved when parents have clarity about the educational benefit to which their child is entitled. With greater certainty, parents can better collaborate with the school and better advocate for their children. Moreover, in the rare circumstance where parents must consider placing their child in a different school – a decision with grave emotional and financial consequences – certainty is essential. Parents should be able to calculate the risk of unilateral action if they believe their child is not benefitting from his or her education. This Court can reduce the difficulty of the calculation by answering the question presented.

Similarly, school administrators "require a consistent objective standard" to efficiently provide education to children with disabilities. Amicus Brief for Nat'l Sch. Bds. Ass'n et al., *Deal v. Hamilton Cty. Dep't. of Educ.* (No. 05-55), 2005 WL 2176860, at *4 (2005). For this reason, the National School Boards Association and the American Association of School Administrators, representing "nearly 15,000 local school districts" and "over 14,000 local school system leaders," urged this Court to resolve the question

presented a decade ago. *Id.* at *1, *4. These amici recognized that a consistent standard would aid officials "on the front lines" in "provid[ing] the best education possible to all children in their care." *Id.* at *1, *3; *see also* Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 Exceptional Children 497, 497 (2013).

B. Deciding The FAPE Standard Will Make An Important Difference In Educating Children With Disabilities.

The substantial educational benefit standard, as adopted by the Third and Sixth Circuits, differs significantly in effect from the just-above-trivial standard followed by the Tenth Circuit below and other courts of appeals. The Tenth Circuit suggested that the difference between the standards may be largely semantic. Pet. App. 17a n.8. To be sure, some courts occasionally have used the terms "meaningful benefit" and "some benefit" to describe the same standard. *See D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 814 (8th Cir. 2011) (Bye, J., dissenting). But lower-court rulings demonstrate that the substantial benefit standard and the just-above-trivial standard have "produced vastly different results for students with disabilities." Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & Educ. 25, 25 (2012).

For example, in *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2009), the district court had initially applied a heightened standard and held that the school district had denied a FAPE to the child in question. *Id.* at 946. The Ninth Circuit disagreed, holding that the district court was wrong to apply a heightened standard. *Id.* at 950-51. On remand, the district court reversed its previous decision and held that, under the lower standard, the school district had provided the child a FAPE. *J.L. v. Mercer Island Sch. Dist.*, No. C06-494MJP, 2010 WL 3947373, at *8 (W.D. Wash. Oct. 6, 2010).

Similarly, in *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999), the Third Circuit ruled that the district court was wrong to apply the lower standard and remanded the case for further proceedings, indicating that it believed the outcome could change under the higher standard. *Id.* at 247-48; *accord Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184-86 (3d Cir. 1988) (holding that under the correct, higher standard summary judgment for school district could not be affirmed), *cert. denied*, 488 U.S. 1030 (1989).

Drew's case also illustrates that the difference between the standards will affect case outcomes. Directly after recounting the evidence and ruling for the school district under the lower standard, the court of appeals remarked that Drew's was "without question a close case." Pet. App. 23a. The Tenth Circuit thus likely would have reached a different result had anything more than a just-above-trivial benefit been required.

C. This Court Regularly Grants Review To Clarify The IDEA.

Since *Rowley*, this Court has recognized the IDEA's importance by repeatedly providing guidance on its proper operation. *See, e.g.*, *Winkelman ex rel. Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516 (2007) (parents' right to prosecute IDEA claims on their own behalf); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (entitlement to expert fees); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (burden of proof in administrative hearings); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (entitlement to certain services for children with disabilities); *Honig v. Doe*, 484 U.S. 305 (1988) (breadth of provision authorizing child to "stay put" pending resolution of placement dispute).

On several occasions, this Court has also addressed issues related to tuition reimbursement under the IDEA. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Because whether the school district has provided a FAPE determines a parent's entitlement to tuition reimbursement, *see Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), these decisions will be more accurately and uniformly applied if the Court resolves the question presented.

III. This Case Is An Excellent Vehicle For Resolving The Question Presented.

This case presents an ideal vehicle for this Court to resolve the circuit split and provide lower courts with guidance in applying the IDEA.

1. The Tenth Circuit's decision is final, and resolution of the question presented will likely be outcome determinative. If the Court holds that the Tenth Circuit applied the proper standard, Drew's case is over. On the other hand, it is unlikely that Drew's IEP would have satisfied the higher, substantial educational benefit standard. As noted earlier, the Tenth Circuit stated that whether Drew received even a nontrivial benefit was a "close case," Pet. App. 23a, presumably because his fifth-grade IEP was nearly identical in substance to his fourth-grade IEP, *id.* 50a, and his fourth grade IEP had abandoned many of Drew's prior educational objectives due to his lack of progress, *id.* 44a.

If this Court determines a higher standard applies, it could decide whether Drew's fifth-grade IEP met that standard on facts already fully developed below – as it did in *Rowley* – or it could remand to allow the lower courts to apply the new standard.

2. By contrast, the two petitions for certiorari raising the proper standard for FAPE that the Court has received in the past decade were poor vehicles for review. *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005), involved a non-final decision, *id.* at 865, and respondent had won below on other grounds that could have provided all the relief to which he was entitled, *id.* at 859-61. *See* Brief in Opposition, *Hamilton Cty. Dep't. of Educ. v. Deal* (No. 05-55), 2005 WL 2204186, at *29-30 & n.13 (2005). And in *Thompson R2-J Sch. District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009), the Tenth Circuit did not even

contemplate choosing between different standards of educational benefit. *Id.* at 1150-52.

IV. The Tenth Circuit Erred In Adopting A Just-Above-Trivial Standard.

The IDEA seeks to provide children with genuine access to public education. To meet this goal, school districts must provide a substantial educational benefit to children with disabilities, as the Third and Sixth Circuits have held. School districts that provide only a just-above-trivial benefit cannot achieve this objective.

1. The IDEA requires that children with disabilities be provided a "free appropriate public education." 20 U.S.C. § 1401(9). The meaning of the word "appropriate" is naturally informed by the Act's more particular requirements and purposes. In 1982, as noted, this Court expressly declined to decide what level of educational benefit the Act requires. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982). At the same time, the Court recognized that the Act demands not only creation of IEPs and simple access to public schools for children with disabilities, but also that IEPs provide enough substantive educational benefit "to make such access meaningful." *Id.* at 192.

What is more, the Act has evolved significantly since its enactment. With the 1997 amendments, Congress acknowledged that prior versions of the Act had succeeded in "ensuring children with disabilities and the families of such children access to a free appropriate public education." 20 U.S.C. § 1400(c)(3). But Congress recognized that education of children with disabilities continued to be "impeded by low

expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning." *Id.* § 1400(c)(4).

As a result, the 1997 amendments shifted the Act's focus from simply guaranteeing access to education to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). This Court has expressly recognized this "greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, p. 5 (1997)).

Consistent with this shift, the 1997 and 2004 amendments added several requirements to help children with disabilities succeed in school and beyond. For example, schools must produce progress reports for children with disabilities with the same frequency as they issue report cards for students without disabilities and must document both "academic achievement and functional performance." 20 U.S.C. § 1414(d)(1)(A)(i)(III), (VI)(aa) (added in 2004). Schools must include students with disabilities in statewide assessments that apply to students without disabilities unless they can justify the decision to give students with disabilities alternative assessments. *Id.* §§ 1412(a)(16) (added in 1997), 1414(d)(1)(A)(i)(VI)(bb) (added in 2004). Services also must be based on peer-reviewed research whenever practicable. *Id.* § 1414(d)(1)(A)(i)(IV) (added in 2004). And, for children over age fifteen, IEPs must describe the transition services necessary to prepare them for

post-secondary education, employment, and – as appropriate – independent living. *Id.* § 1414(d)(1)(A)(i)(VIII) (added in 2004).

Since 1997, the Department of Education has issued regulations interpreting these requirements. For instance, the Department requires schools to adapt instruction to ensure "that the child can meet the educational standards" that "apply to *all* children" – both those with disabilities and those without. 34 C.F.R. § 300.39(b)(3) (emphasis added). In addition, schools must provide students "an equal opportunity for participation" in extracurricular services and activities, which include athletics, clubs, and student employment. *Id.* § 300.107 (2015).

Moreover, in a recent "Dear Colleague" letter, the Department of Education urged state and local education agencies to ensure "that all children, including children with disabilities, are held to rigorous academic standards and high expectations." U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015), http://1.usa.gov/1MkxyAE. Specifically, the letter expressed concern that low expectations – especially in the form of below grade-level content standards – are impeding the success of children with disabilities. *Id.* Applying equal standards to all children, the Department said, will promote "high-quality instruction" for children with disabilities and "prepare them for college, careers and independence." *Id.* at 3-4.

The Tenth Circuit's just-above-trivial standard is inconsistent with these goals and perpetuates the "low expectations" for children with disabilities that

Congress has found impedes their progress. 20 U.S.C. § 1400(c)(4). The IDEA requires that IEPs be calculated to provide a substantial educational benefit to children with disabilities – not just a non-trivial benefit – to achieve the IDEA's goals of equality of opportunity, full participation, and improved student performance. *See Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *see also N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1213 nn.2-3 (9th Cir. 2008).

2. *Rowley* is consistent with a substantial educational benefit standard.

In *Rowley*, this Court held that the Education for All Handicapped Children Act did not require the school district to provide a deaf student with sign language interpreter services, given that she was "perform[ing] better than the average child in her class," was "advancing easily from grade to grade," was "remarkably well-adjusted," 458 U.S. at 185 (quoting district court findings), and interacted and communicated well with her classmates, *id.* at 185, 210.

Understood in this context, the Court held that a standard requiring school districts to maximize a child's potential – which had been applied by the courts below – was not supported by the Act. *Rowley*, 458 U.S. at 189-90. But it also recognized that an education that confers no benefit at all cannot be sufficient. *Id.* at 200-01. Thus, the Court's statement that the Act demands "some educational benefit," *id.* at 200 – pointed to by some courts of appeals as support for a lower standard – did not prescribe a required amount of benefit. It only restated the

Court's determination that a child must actually receive a "*benefit* from special education," rather than none at all. *Id.* at 201. Thus, the situation here, post-*Rowley*, is similar to a situation in which the Court has held simply that a person is entitled to substantive legal protection and left open the question of what level of protection is appropriate.[4]

Indeed, as noted above, *Rowley* itself was not attempting "to establish any one test for determining the adequacy of educational benefits." 458 U.S. at 202. It "confine[d its] analysis" to the situation before it, in which a child was already "performing above average in the regular classrooms." *Id.* For these reasons, courts of appeals that maintain a just-above-trivial standard because they interpret *Rowley* as specifying this standard are incorrect.

Finally, although *Rowley* declined to interpret the Act as requiring equality of educational opportunity for children with disabilities, 458 U.S. at 198-99, lower courts' attempts to read this view as supporting the lower standard have since been foreclosed by Congress. The IDEA now seeks to ensure "equality of opportunity" for children with disabilities. 20 U.S.C. § 1400(c)(1). That express

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[4] *See, e.g., United States v. Jones*, 132 S. Ct. 945, 954 (2015) (holding that the Government's placement on a vehicle of a GPS device is a Fourth Amendment "search," but leaving open the question whether probable cause and a warrant are required); *cf. Heller v. Doe*, 509 U.S. 312, 319 (1993) (deciding equal protection challenge to a statutory classification under rational-basis review, but leaving open the question whether the classification is subject to heightened scrutiny because the issue was not properly presented).

statutory goal underscores the conclusion that a school district cannot provide children with disabilities a free appropriate public education unless it seeks to provide them with a substantial educational benefit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Wolfman
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

Jack D. Robinson
Counsel of Record
SPIES, POWERS &
ROBINSON, P.C.
1660 Lincoln Street
Suite 2220
Denver, CO 80264
(303) 830-7090
robinson@sprlaw.net

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APPENDIX

APPENDIX A

FILED
United States Court of Appeals Tenth Circuit
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Elisabeth A. Shumaker
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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ENDREW F., a minor, by and through his parents and next friends, JOSEPH F., and JENNIFER F., Plaintiffs-Appellants, v. DOUGLAS COUNTY SCHOOL DISTRICT RE-1, Defendant-Appellee.	No. 14-1417

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 1:12-CV-02620-LTB)

Jack D. Robinson, Spies, Powers & Robinson, P.C., Denver, Colorado, for Appellants.

Robert S. Ross, Jr., Douglas County School District Re-1, Castle Rock, Colorado, for Appellee.

Before **HARTZ**, **TYMKOVICH**, and **PHILLIPS**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Federal law requires public schools to provide students with disabilities a free and appropriate education. If a school cannot meet the educational needs of a disabled student, the student's parents can place the child in private school and seek reimbursement of tuition and related expenses. In this case, the parents of an autistic child withdrew him from the Douglas County School District because they believed his educational progress was inadequate. They later sought reimbursement that the District challenged. The District's denial of reimbursement was upheld after a due process hearing in administrative court, and that determination was also upheld in federal district court.

We affirm. We find sufficient support in the record to affirm the findings of the administrative law judge that the child received some educational benefit while in the District's care and that is enough to satisfy the District's obligation to provide a free appropriate public education. Accordingly, under Tenth Circuit precedent, the District did not violate the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (IDEA), and is not required to reimburse the cost of the student's private-school education.

I. Background

The IDEA makes federal education funding conditional on the states' provision of a "free appropriate public education" (FAPE) to all children with disabilities. *See* 20 U.S.C. § 1412(a)(1)(A). The central mechanism by which the Act ensures a FAPE

for each child is the development and implementation of an individualized education program (IEP). *See id.* § 1401(9) (defining a FAPE as "special education and related services that . . . are provided in conformity with the [IEP] required under section 1414(d)"); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) ("The *modus o erandi* of the Act is the . . . [IEP]." (internal quotation marks omitted)). An IEP is "a detailed written document which describes the student's educational goals for an academic year and establishes a plan to achieve those goals." *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1230 (10th Cir. 2012). The Act put in place detailed procedural requirements by which a child's IEP must be created and maintained. *See* 20 U.S.C. § 1414(d)(1)(A)(i). Beyond the procedure required, however, Congress "left the content of th[e] programs entirely to local educators and parents." *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1151 (10th Cir. 2008). The Act does not prescribe the substantive level of achievement required for an appropriate education. Rather, the substantive adequacy of an IEP is determined by a standard articulated by the Supreme Court: the IEP must be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

The plaintiff-appellant, Endrew F. (Drew), was diagnosed with autism at the age of two and with attention deficit/hyperactivity disorder a year after that. Drew's autism affects his cognitive functioning, language and reading skills, and his social and adaptive abilities. Drew attended Douglas County

schools from preschool through fourth grade. During that time, he received special-education services, including IEPs tailored to meet his unique needs.

At the conclusion of an especially rocky fourth-grade year, Drew's parents, Joseph and Jennifer F., decided Drew was not making any meaningful progress and rejected the IEP proposed by the District for fifth grade. As a result, they withdrew him from the District and instead enrolled him at Firefly Autism House, a private school that specializes in educating autistic children. The parents then turned to the District for reimbursement of Drew's private-school tuition and related expenses. *See* 20 U.S.C. § 1412(a)(10)(C)(ii). They contended the reimbursement was due because the District had failed to provide Drew with a FAPE.

After a three-day administrative due process hearing, *see id.* § 1415(f), an administrative law judge (ALJ) denied the request finding the District had provided Drew with a FAPE. The parents next filed suit in federal court for judicial review of the ALJ's decision. *See id.* § 1415(i)(2)(A). The district court affirmed.

II. Discussion

Drew's parents contend they are entitled to tuition reimbursement under the IDEA and that the ALJ and the district court failed to recognize the District's procedural and substantive violations of the Act. After describing the tuition reimbursement provisions of the IDEA, we consider the District's denial of reimbursement and ask whether the procedural and

substantive violations alleged by the parents resulted in the denial of a FAPE.

A. Tuition Reimbursement Under the IDEA

The IDEA allows parents who believe their children are not receiving a FAPE in state schools an option. Those parents may pull their children from public school, enroll them in private school, and then request reimbursement from the school district. *Id.* § 1412(a)(10)(C)(ii); *see also Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12–13 (1993); *Burlington*, 471 U.S. at 370.[1]

Parents who take unilateral action, however, "'do so at their own financial risk.'" *Jefferson Cty.*, 702 F.3d at 1232 (quoting *Florence Cty.*, 510 U.S. at 15). If a school district denies the parents' request for reimbursement, a court may order reimbursement only if (1) "'the public placement violated IDEA'" and (2) "'the private school placement was proper under the Act.'" *Id.* (quoting *Florence Cnty.*, 510 U.S. at 15). There is no contention here that Drew's placement at Firefly is not permissible under the Act. The only issue

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[1] Section 1412 provides:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a [FAPE] available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(10)(C)(ii); *see also* 34 C.F.R. § 300.148(c).

is whether the District violated the IDEA by failing to provide Drew with a FAPE.[2]

In determining whether a school district provided a student with a FAPE, we follow a two-step analysis and ask (1) whether the district complied with the Act's procedural requirements, and (2) whether the IEP developed by those procedures is substantively adequate such that it is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *see also O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701 (10th Cir. 1998). If a district has met both the procedural and substantive requirements, it "has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 207.

We review the district court's judgment de novo, applying the same standard of review as the district court. *Jefferson Cty.*, 702 F.3d at 1232. In reviewing an administrative decision in the IDEA context, we apply a modified de novo standard of review, meaning we give "'due weight'" to the administrative proceedings and consider the ALJ's factual findings to

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[2] A school district may also violate the Act by failing to provide a child with an education in the least restrictive environment. *See Thompson*, 540 F.3d at 1148; *see also L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 975 n.13 (10th Cir. 2004) ("The IDEA requires *both* that the child be provided a FAPE *and* that such a FAPE be provided in an LRE [least restrictive environment] to the maximum extent appropriate."). Drew and his parents do not raise this type of claim on appeal and we do not consider it.

be prima facie correct. *Id.* (quoting *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1125 (10th Cir. 2008)).

B. Application

The parents raise both procedural and substantive challenges. They first allege two procedural deficiencies: (1) the District's failure to provide them with adequate reporting on Drew's progress during the school years, and (2) the District's failure to conduct a proper assessment of Drew's behavior and put in place an adequate plan to address his particular behavioral needs.

Their substantive challenge also proceeds in two parts. First, the parents argue the district court and the ALJ utilized the wrong legal standard in evaluating the substantive sufficiency of the rejected fifth-grade IEP. Second, they argue the ALJ and the district court erred in concluding the IEP was substantively adequate because (1) Drew made no measurable progress on the goals set in his past IEPs, and (2) there was no consideration of Drew's escalating behavioral problems.

We consider each in turn.

1. Procedural Challenges

The Supreme Court has emphasized the importance of the procedural safeguards contained in the Act, explaining that "[w]hen the elaborate and highly specific procedural safeguards embodied in [the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, . . . the importance Congress attached to these procedural safeguards cannot be gainsaid." *Rowley*,

458 U.S. at 205. But merely identifying a procedural deficiency does not automatically entitle a family to relief. *See Systema ex rel. Systema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008); *O'Toole*, 144 F.3d at 701. A school district's procedural failure must have effectively denied the child a FAPE either because it (1) "impeded the child's right to a [FAPE]," (2) "significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child," or (3) "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E); *see also Garcia*, 520 F.3d at 1126 ("[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE.").

Drew's parents contend they meet this standard because the District's alleged procedural violations impeded their ability to participate in informing Drew's education and denied Drew his right to adequate educational benefits.

a. Progress Reporting

The first procedural deficiency alleged by the parents is the District's failure to adequately report Drew's progress toward the annual goals and objectives listed in his IEPs. They contend the lack of progress reporting deprived them of meaningful participation in Drew's education. We agree with the District that, even assuming a procedural violation,[3]

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[3] The Act requires that the IEP include "a description of how the child's progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress the child is

the District's progress reporting did not result in the denial of a FAPE.

As an initial matter, the District concedes that the progress reporting on Drew's IEPs could have been more robust. As the ALJ found, Drew's IEPs contain little or no progress reporting or measurement data and where progress was reported, it was "lacking in detail" or limited to "conclusory statements about whether [Drew] was on track to meet the expectations of the plan and whether the objective had been completed or would be continued." R., Vol. I at 9, 15. But the District contends what was reported was sufficient for the parents to assess Drew's progress and that whatever deficiencies existed, the parents' involvement in Drew's education did not suffer as a result.

Drew's parents were not absentee caretakers; they were just the opposite. The ALJ found that, in addition to the progress reporting that was included on Drew's IEPs, there was substantial evidence of the parents' awareness of Drew's progress and of their active participation in his education. For instance, the ALJ found the parents were "in constant communication" with Drew's special education teacher both through face-to-face meetings and a "back-and-forth notebook," which was used to inform the parents of what occurred

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making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided." 20 U.S.C. § 1414(d)(1)(A)(i)(III); *see also* 34 C.F.R. § 300.320(a)(3)(i). But neither the IDEA nor its implementing regulations actually prescribe the frequency or the content of progress reports.

at school and to inform Drew's teacher of what happened in the home. *Id.* at 16; *see also id.* at 96 (D. Ct. Op. at 23) (finding "significant informal communication with the parents as to [Drew's] progress"). Drew's teacher testified at the hearing that she sent home quarterly progress reports (concurrent with the timing of report cards). The parents also received Drew's draft IEPs in advance of each team meeting and were active in suggesting what goals and objectives should be modified, added, or dropped from Drew's IEPs. Accordingly, the ALJ did not err in concluding the gaps in the reporting on some of Drew's IEPs did not inhibit the parents from meaningful participation in Drew's education.

The parents point us to a case where a district court concluded that a school district's reporting deficiencies amounted to a substantive denial of a FAPE. *See Escambia Cty. Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005). In that case, however, the student's IEPs not only lacked progress reporting, but also included annual goals and objectives that were alternatively described by the district court as "mushy, ambiguous, [and] unquantifiable" and "[v]ague and unmeasurable." *Id.* at 1274–75. The critical distinction between *Escambia* and Drew's case is that the hearing officer there "plainly found adverse impacts" caused by the procedural defects on the IEP team's ability to make necessary adjustments and interventions in the child's education. *Id.* at 1273–74. Here, by contrast, the ALJ found the deficiencies in the District's reporting did not have an adverse impact on the IEP team's ability to craft and implement Drew's IEPs.

In reaching this conclusion, we do not downplay the importance of regular and diligent progress reporting on IEPs. In a system built on the continuous revision of individualized plans meant to address disabled students' unique needs, data on what is or is not working for a student is crucial. *See* Mitchell L. Yell et al., *Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools*, 41 Fordham Urb. L.J. 669, 709 (2013) ("Appropriate monitoring of a student's progress . . . is essential because without measuring a student's progress, it will be impossible to determine if the student's program is working."). Thus, while we do not endorse the District's reporting in this case, without evidence that there was an impact on Drew's education, we cannot say he was effectively denied a FAPE.

In short, the record supports the ALJ's conclusion the parents were aware of Drew's progress and fully participated in his education.

b. Behavioral Assessment

The parents' second procedural argument is that the District's handling of Drew's behavioral needs amounted to a substantive denial of a FAPE. Specifically, they criticize (1) the District's failure to conduct a functional behavior assessment (FBA) before implementing a behavior plan for Drew, and (2) even absent the FBA, the District's failure to put in place an

appropriate behavioral intervention plan (BIP) to address Drew's increasing behavioral issues.[4]

Drew exhibited multiple behaviors that inhibited his ability to access learning in the classroom. In the past, he has climbed over furniture and other students, hit things, screamed, ran away from school, and twice removed his clothing and gone to the bathroom on the floor of the classroom. Drew's second and fourth grade IEPs contained behavior plans (although they are somewhat ambiguously marked "draft"). These plans identified some of Drew's problem behaviors and possible ways to manage and reduce those behaviors. The school was also in regular contact with the parents regarding Drew's behavior.

Despite the school's prior attempts to manage his behavior, during Drew's fourth-grade year his behaviors increased to such a degree that the school decided to go back to the drawing board and rework their approach. Drew's special education teacher kept notes on, and anecdotal data of, Drew's behavior in an effort to pinpoint Drew's triggers. The District also scheduled an autism specialist and a behavioral specialist to come in and meet with Drew's IEP team to put a new behavioral plan in place. The parents did

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[4] An FBA "identif[ies] the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors." Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle U. L. Rev. 175, 175 (2011). FBAs are often completed prior to and become the basis of a student's BIP, which is the "concrete plan of action for reducing problem behaviors." *Id.*

not attend the meeting as they pulled Drew from the District before its scheduled date.

Drew's mother testified that the escalation of Drew's behavior left them with what they felt was one choice—to place Drew in a different learning environment. But as a matter of procedure, the District did not violate any provision of the IDEA or its implementing regulations. The Act provides that in developing and revising a student's IEP, the IEP team must, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); *see also* 34 C.F.R. § 300.324(a)(2)(i). The requirement is merely to "*consider* the use" of the listed behavioral interventions. *See* Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle L.R. 175, 186 (2011) (noting the operant verb is "to consider," and not "to develop or implement"). The statute only *requires* school districts (and even then, only "as appropriate") to conduct an FBA or to implement a behavioral plan if there is a disciplinary change in placement of the student.[5] *See*

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[5] State law often goes further than the IDEA with respect to when FBAs and BIPs are required. *See, e.g., T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 169 (2d Cir. 2014) ("New York state regulations go beyond this floor set by the IDEA; they require a school district to conduct a full FBA for a student who exhibits behavior that impedes learning, and to develop a BIP to address that behavior."). And school districts must comply with state educational standards that are not inconsistent with federal standards. *See O'Toole*, 144 F.3d at 698. Drew and his parents

20 U.S.C. § 1415(k)(1)(D)(ii) ("A child with a disability who is removed from the child's current placement . . . shall . . . receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."); *see also Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8th Cir. 2011) ("The IDEA only *requires* that an IEP include . . . a 'behavioral intervention plan' in limited circumstances not present in this case."); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 25 (1st Cir. 2008) ("The IDEA only requires a behavioral plan when certain disciplinary actions are taken against a disabled child."); *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 614 (7th Cir. 2004); Susan C. Bon & Allan G. Osborne, Jr., *Does the Failure to Conduct an FBA or Develop a BIP Result in a Denial of a FAPE Under the IDEA?*, 307 Educ. L. Rep. 581, 581 (2014). And even where an FBA or BIP is required, the IDEA does not impose any substantive requirements as to what they must include. Bon & Osborne, *supra*, at 583.

Drew was never subject to a disciplinary change in placement. Thus, even though the record establishes that Drew is "a child whose behavior impedes the child's learning or that of others" all that was required by the Act was for the District to "consider" behavioral intervention. 20 U.S.C. § 1414(d)(3)(B)(i). The record is filled with examples of the District's consideration of Drew's behavioral issues. Thus, the District complied

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make no argument based on Colorado law and we do not consider it.

with federal law. *See R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012) (finding the school district complied with federal law where the district considered behavioral interventions and the child had not been removed from her placement due to disciplinary infractions); *Lessard*, 518 F.3d at 26 (same).

In sum, we find no procedural defect that amounted to a denial of a FAPE.

2. Substantive Challenge

Because neither of the parents' procedural arguments establish a violation of the Act, we must resolve their argument that the District's proposed fifth-grade IEP was substantively inadequate. The parents submit it was not adequate for two reasons. First, because the fifth-grade IEP was similar in all material respects to Drew's past IEPs, they contend that Drew's lack of progress on the objectives listed in those IEPs is dispositive of whether the rejected IEP was reasonably calculated to provide Drew educational benefit. Second, the parents contend the ALJ failed to consider the impact of Drew's escalating behavioral problems in determining whether the IEP was reasonably calculated to provide Drew an educational benefit.

Before reaching these arguments, we must first address the parents' contention that our circuit recently shifted the standard with which we measure the substantive adequacy of an IEP—that is, whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. Specifically, they argue our opinion in *Jefferson*

County School District v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012) abandoned the "some educational benefit" standard previously articulated in our cases (and applied by the ALJ and the district court) in favor of a heightened "meaningful educational benefit" standard.

A brief detour in the case law explains the argument and its resolution. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court, in considering the statutory precursor to the IDEA, the Education of the Handicapped Act (EHA), determined that Congress's aim had been to set a "basic floor of opportunity" for disabled children by "providing individualized services sufficient to provide every eligible child with '*some* educational benefit.'" *Thompson*, 540 F.3d 1143 at 1149 (quoting *Rowley*, 458 U.S. at 200). Congress did not "'guarantee educational services sufficient to maximize each child's potential.'" *Id.* (quoting *Rowley*, 458 U.S. at 198) (internal quotation marks omitted); *see also Rowley*, 458 U.S. at 192 (stating that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside"). This circuit has long subscribed to the *Rowley* Court's "some educational benefit" language in defining a FAPE, *see O'Toole*, 144 F.3d at 707-08, and interpreted it to mean that "the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" *Thompson*, 540 F.3d at 1149 (quoting *Urban ex rel. Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)).

Several circuits have adopted a higher standard—requiring a "meaningful educational benefit." *See, e.g.*, *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 808–09 (5th Cir. 2003); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988). These courts have relied on other language in *Rowley*[6] as well as language in post-*Rowley* amendments to the IDEA, which some have interpreted as promising disabled children a higher measure of achievement.[7] This circuit, however, has continued to adhere to the *Rowley* Court's "some educational benefit" definition of a FAPE.[8] In

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[6] The *Rowley* Court also said, "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*." 458 U.S. at 192 (emphasis added).

[7] In the wake of post-*Rowley* amendments to the IDEA in 1997 and 2004, many commentators argued for the adoption of a higher substantive standard. *See* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free Appropriate Public Education"?*, 28 J. Nat'l Ass'n Admin. L. Judiciary 396, 402–03 (2008); Perry A. Zirkel, *Is it Time for Elevating the Standard for FAPE Under IDEA?*, 79 Exceptional Child 497, 498–99 (2013).

[8] Although the "meaningful benefit" standard is purportedly higher than the "some benefit" standard, the difference between them—that is, how much *more* benefit a student must receive for it to be meaningful—is not clear. *Systema*, 538 F.3d at 1313 n.7 ("Admittedly, it is difficult to distinguish between the requirements of the 'some benefit' and the 'meaningful benefit' standards."). *Compare* Scott F. Johnson, Rowley *Forever More? A*

Thompson, we found it inconsequential that *Rowley* had analyzed the statutory precursor to the IDEA because Congress has maintained the same statutory definition of a FAPE from its initial inception in the EHA and in each subsequent amendment to the Act. *See* 540 F.3d at 1149 n.5. We also noted that subsequent Supreme Court decisions have cited *Rowley*'s definition of a FAPE approvingly. *See id.* (citing *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525 (2007)); *see also* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1, 5–6

Call for Clarity and Change, 41 J.L. & Educ. 25, 27 (2012) (arguing that "[u]sing one standard or the other can dramatically affect the outcome of a case and the services provided to a student"), *with* Andrea Kayne Kaufman & Evan Blewett, *When Good Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the* Rowley *Definition of a Free Appropriate Public Education*, 41 J.L. & Educ. 5, 20–21 (2012) (noting it is "unclear whether or not there is any real difference . . . other than semantics"), *and* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1, 4 (2009) (arguing that "the use of different terminology does not appear to create different substantive standards or lead to different results").

Although commentators agree there is a circuit split on the applicable standard, which circuit falls on which side varies depending on which commentator you read. *Compare* Kaufman & Blewett, *supra*, at 20 (stating that the majority of the circuit courts adhere to the "some educational benefit" standard), *and* Wenkart, *supra*, at 1 (same), *with* Scott Goldschmidt, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 Cath. U. L. Rev. 749, 751 (2011) (stating that "a slight majority" of circuits "requir[e] a heightened-educational-benefit standard").

(2009) (noting subsequent Supreme Court cases have not questioned or overruled the *Rowley* standard). And in *Systema ex rel. Systema v. Academy School District No. 20*, we explicitly rejected an argument that this court should follow the Third Circuit's heightened "meaningful benefit" standard because as we explained there, this circuit applies "the 'some benefit' standard the Supreme Court adopted in *Rowley*." 538 F.3d at 1313 & n.7 (citing *O'Toole*, 144 F.3d at 699).

The parents agree with us up to this point, but contend that our more recent opinion in *Jefferson County* marked a "fundamental shift" in circuit precedent and adopted the "meaningful educational benefit" standard. Aplt. Br. at 12. Relying on *Jefferson County*, they ask that we now expressly overturn *Thompson R2-J School District v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143—the case relied on by the ALJ and the district court for the "some educational benefit" standard. That we cannot do. We are bound by *Thompson* (and the cases preceding it) "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

Nor do we see, in any event, evidence that the *Jefferson County* panel intended to abandon the "some educational benefit" standard. The issue in *Jefferson County* was not how much benefit to a child must be demonstrated to surpass the substantive threshold of a FAPE. In fact, the hearing officer in that case found the school district failed to provide the student with a FAPE and the district did not appeal that finding before the ALJ, the district court, or on appeal to this

court. Thus, we had no reason to discuss the proper standard to apply in making that determination.

The issue was how—absent a FAPE—to determine if a child's placement in a private, residential facility is proper under the Act and thus reimbursable. Much of the opinion was spent outlining the approaches from other circuits—as is relevant here, one from the Third Circuit and one from the Fifth. As referenced above, both the Third and the Fifth Circuits define a FAPE to require the conferral of a meaningful educational benefit. The three appearances of the phrase "meaningful educational benefit" in the majority opinion of *Jefferson County* is a reflection of the effort spent recounting the law of those circuits and not a discrete attempt to depart from this circuit's well-established definition of a FAPE. The first appearance of "meaningful educational benefit," for instance, appears within a quote from a Fifth Circuit opinion. 702 F.3d at 1234 (quoting *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009)). The second and third instances do recount that the IDEA requires "that all children, no matter how disabled, receive some meaningful educational benefit," *id.* at 1238, but that language is supported by both a cite to a Third Circuit opinion and a citation to *Thompson*. In our view, those citations—one to a circuit following a "meaningful educational benefit" standard and one following the "some educational benefit" standard—make it clear that the fleeting references to "meaningful educational benefit" in *Jefferson County* is nothing more than that. Regardless, this panel, like the *Jefferson County* panel, has no authority to

deviate from *Thompson*, or the cases preceding it,[9] that establish how much benefit must be shown to the child to find that a district provided a student with a FAPE in this circuit.

Thus, the ALJ and the district court applied the correct standard, and we too consider the parents' challenge to the sufficiency of the IEP under this circuit's "some educational benefit" standard. In applying this standard, the measure is whether the IEP is reasonably calculated to guarantee some educational benefit, not whether it *will* do so. Thus, "our precedent instructs that the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Thompson*, 540 F.3d at 1149 (quoting *O'Toole*, 144 F.3d at 701–02) (internal quotation marks omitted).

The ALJ and the district court relied on evidence of Drew's progress on past IEPs as proof of the adequacy of the fifth-grade IEP. Although evidence of past progress is not "dispositive of the controlling question whether, going forward, the [latest] IEP was reasonably calculated to confer some educational benefit," we have said that past progress "strongly suggest[s]" the current IEP is "reasonably calculated to continue that trend. *Id.* at 1153.

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[9] *See, e.g.*, *Systema*, 538 F.3d at 1313 ("[W]e apply the 'some benefit' standard the Supreme Court adopted in *Rowley*."); *O'Toole*, 144 F.3d at 699.

In this case, the parents contend there is no trend of progress, both because the District failed to measure Drew's progress on his past IEPs and because any progress made was de minimis. The ALJ found that, despite the reporting deficiencies, it was evident that Drew made progress towards his academic and functional goals on his IEPs and that he received educational benefit during the time he was enrolled in the District.[10] The ALJ's finding of progress is a factual finding that is owed a presumption of correctness

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[10] R., Vol. I at 8 ("Through first and second grade, [Drew] was progressing academically."); *id.* at 9 (finding Drew "was making progress towards some of [his] goals and objectives during . . . third grade"); *id.* (finding the objectives and criteria in Drew's 2008 IEP "were modified to account for [Drew's] progress toward those goals"); *id.* at 10 (finding that despite increased behavioral problems, "during the school year 2009 [Drew] was still making some progress towards [his] academic and functional goals"); *id.* at 12 (concluding that Drew "made progress" during his time in District schools).

The parents point to the district court's statement that the record "did not reveal immense educational growth," but was "sufficient to show a pattern of, at the least, minimal progress." *Id.* at 93. The parents say that statement proves that Drew's progress fell short of even the "some educational benefit" standard which requires *more* than de minimis progress. But the district court also stated that the "past IEPs reveal[] a pattern of *some progress* on his education and functional goals, and that the proposed IEP for the fifth grade continues that pattern." *Id.* at 94 (emphasis added); *see also id.* (stating Drew "made progress towards his academic and functional goals" and "received educational benefit while enrolled in the District"). Moreover, in reviewing the ALJ's decision, we apply the same standard as the district court, and as we conclude below, the ALJ's findings of progress are supported by the record and are sufficient to find Drew received some educational benefit.

under our modified de novo standard of review. *See id.* at 1153 n.9.

And a review of the record reveals support for the ALJ's finding. Drew's IEPs from second, third, and fourth grades[11] reveal that the objectives and measuring criteria listed under the annual goals set for Drew by the IEP team typically increased with difficulty from year to year. In the areas where Drew was not ready to move ahead, the objective remained the same on the next year's IEP. Drew's special education teacher testified at the hearing that the change in objectives reflected the progress Drew was making. Drew's mother also testified that despite her belief Drew was not reaching his potential, she did see some academic progress in first, third, and fourth grades.

This is without question a close case, but we find there are sufficient indications of Drew's past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard. It is clear from the testimony at the due process hearing that Drew is thriving at Firefly. But it is not the District's burden to pay for his placement there when Drew was making some progress under its tutelage. That is all that is required. "The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make *some*

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[11] Drew's IEPs from years prior to second grade are not in the record.

progress towards the goals within that program." *Thompson*, 540 F.3d at 1155 (emphasis added); *see also Rowley*, 458 U.S. at 197 n.21 (stating that the Act does not guarantee students "a potential-maximizing education").

The parents' final contention is that the District's handling of Drew's behavior is a relevant consideration in determining whether the IEP they rejected was substantively adequate. We find support for their contention in some of the case law, but disagree both that the ALJ ignored Drew's behavioral issues and that the District failed to address those issues. *See Alex R.*, 375 F.3d at 613 ("To meet the . . . substantive criterion of *Rowley*, an IEP must respond to all significant facets of the student's disability, both academic and behavioral."); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1029–30 (8th Cir. 2003) (holding the school district failed to provide an educational benefit by not addressing a student's behavioral issues). As recounted above, the District worked to address the behaviors that affected Drew's ability to learn in the classroom.[12] The ALJ found that "the District worked collaboratively with the parents and other service providers to address [Drew's] behaviors as they arose." R., Vol. I at 13. And when the District reached the conclusion that Drew's behavioral

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[12] Although the parents take issue with the substance of the BIPs put in place by the District in prior years, neither the IDEA nor its implementing regulations prescribe substantive requirements for what should be included in BIPs. "[T]he District's behavioral intervention plan could not have fallen short of substantive criteria that do not exist . . . ." *Alex R.*, 375 F.3d at 615.

problems had escalated to such a degree that they were creating a barrier to his academic progress during his fourth-grade year, they called in specialists to reassess and implement a new behavior plan. Drew never received the benefit of the District's efforts because his parents had already enrolled him in Firefly when the meeting was scheduled to take place.[13]

In sum, the record shows the District was actively working to address Drew's disability-related behaviors and that he made some academic progress despite his behavioral challenges. Accordingly, the parents have not met their burden of showing that the IEP they rejected was not reasonably calculated to enable Drew to receive educational benefits.

III. Conclusion

For the foregoing reasons, we find the District provided Drew a free appropriate public education. Because the IDEA provides that reimbursement is due only where the school district has not made a FAPE available to the child, we find the parents are not

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[13] The fifth-grade IEP rejected by the parents, dated April 14, 2010, did not yet include a new BIP because it was set to be drafted after the meeting with the behavioral specialists scheduled for May 10. The parents gave notice of their intent to withdraw Drew on May 1 and did not attend the May 10 meeting. District officials met without the parents in an effort to memorialize their findings on, and recommendations for, Drew's behavior. *See* R., Vol. I at 11 (finding by the ALJ that on May 10 "a draft BIP was prepared by the District"). The parents did meet with district officials the following November and were again presented with an IEP for Drew, which included the BIP drafted in May. That IEP was also rejected by the parents.

entitled to the compensation they seek. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE

Civil Action No. 12-cv-2620-LTB [filed Sept. 15, 2014]

Endrew F., a minor, by and through his parents and next friends, JOSEPH & JENNIFER F.,

Petitioners,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE 1,

Respondent.

ORDER

This matter comes before me upon a request for appellate review of an Office of Administrative Courts decision denying Petitioner's claim under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. §§ 1400 and 34 C.F.R. §§ 300.500, *et. seq.* Petitioner, Endrew F., through his parents, Joseph and Jennifer F., sought reimbursement for private school tuition and transportation costs from Respondent, Douglas County School District RE 1 (the "District") pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii) and 34 C.F.R. § 300.148(c). The Administrative Courts Agency Decision, issued by an Administrative Law Judge ("ALJ") following a due process hearing, concluded that Petitioner and his parents were not entitled to reimbursement on the basis that the District provided him a free appropriate public education ("FAPE") as is required by the IDEA. This

appeal is fully briefed and ripe for disposition. After consideration of the entire appellate record and the parties' briefing, I AFFIRM.

I. BACKGROUND

Petitioner was born on September 28, 1999. At two years of age he was diagnosed with autism, which is defined as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction . . . that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(1)(i). "Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistence [sic] to environmental change or change in daily routines, and unusual responses to sensory experiences." *Id.* In 2003, Petitioner was also diagnosed with Attention Deficit/Hyperactivity Disorder.

Petitioner struggles with the ability to communicate personal needs, emotions and initiations, and does not engage or interact with others in social routines or play. He has compulsive and perseverative behaviors that he has difficulty overcoming throughout the day which, in turn, interferes with the learning environment. He also has many maladaptive behaviors that interfere with his ability to participate, including: eloping, dropping to the ground, climbing, loud vocalizations, perseverative language, and picking/scraping. In addition, Petitioner presents with many severe fears – such as dogs, flies, and using a new or public bathroom – which severely limits his ability to function in school or in the community. It is undisputed that his diagnosis affects his ability to

access education, and he is eligible for services under the IDEA.

Petitioner attended school through second grade at Heritage Elementary, and then moved to Summit View Elementary for third and most of fourth grade, both District schools. In May of 2010, during his fourth grade year, Petitioner's parents decided to withdraw him from Summit View and enroll Petitioner at the Firefly Autism House ("Firefly," previously known as the AltaVista School), a private school that specializes in the education of children with autism. It is undisputed that Petitioner has been able to access education at Firefly where he is making academic, social and behavioral progress. [Administrative Record "AR" Ex. 21] It is Petitioner's parents' position that he stopped making meaningful educational/functional progress in the District schools during his second grade year, and continuing until he withdrew from the District prior to his fifth grade year, as evidenced by the lack of advancement in the goals and objectives set out in his individualized education program ("IEP").

Petitioner's educational records start with his second grade IEP (May 10, 2007 to May 10, 2008) which sets forth six broad annual goals – Communication and Basic Language Skills, Language Arts/Reading and Writing, Mathematics, Physical (Motor), and Self-Advocacy/Self Determination – each implemented by detailed corresponding objectives. [AR Ex. 1] Petitioner's third grade IEP (April 30, 2008 to April 30, 2009) contained the same six annual goals, but with modified objectives. [AR Ex. 2] The same is true for Petitioner's IEP for the four grade (April 14, 2009 to April 14, 2010) except that an annual goal was

added in the area of self-advocacy/ self-determination related to increasing his independence. [AR Ex. 3]

In April 2010, the District developed an IEP for Petitioner's fifth grade year. [AR Ex. 4] This draft IEP was never implemented, however, as Petitioner withdrew from the District before his fifth grade year, in May of 2010, and began attending school at Firefly. Thereafter, input from Firefly was incorporated into a finalized IEP proposed by the District, which was presented during a meeting on November 16, 2010, but was rejected by Petitioner's parents. [AR Ex. 5]

Petitioner's parents argue that he stopped making educational progress during his second grade year in that no meaningful progress is recorded on his IEP for that year. They contend that Petitioner's third grade IEP reveals that 21 of the 26 objectives identified in his second grade IEP were discontinued or abandoned because he was not able to make adequate progress on them. They further assert that Petitioner's fourth grade IEP shows that most of the objectives identified in his third grade IEP were likewise discontinued/abandoned because he was not able to make adequate progress.

Petitioner's parents also argue that the District failed to adequately address his progressively disruptive behavioral issues that, in turn, resulted in his increased inability to access the educational environment. It is undisputed that in his second grade year Petitioner experienced escalating problem behaviors at school, including increased tantrums, yelling, and crying, dropping to the floor and eloping from class. In third grade, following his transfer from

Heritage to Summit View Elementary, Petitioner's social skills declined and his disruptive behaviors increased. During Petitioner's fourth grade year, his ability to function at school and access the educational environment became noticeably worse. He bolted from the classroom frequently and ran out of the school building and into the street on one occasion. He urinated and defecated on the floor of the "calming room" twice. Petitioner's problem behaviors included climbing furniture, falling off furniture, hitting computers or TV screens, yelling, kicking others, kicking walls, head banging, and asking others to punish him.

Petitioner's second grade IEP includes a Behavior Intervention Plan ("BIP") which, his parents argue, addresses only one behavior (Petitioner's fixation on a timer) and there is no indication in the record that it was ever finalized or implemented, as it was stamped "draft" at the top. [AR Ex. 1] His third grade IEP includes no BIP, although it noted that one is required, and his fourth grade IEP includes a BIP, also stamped "draft," that was not developed as a result of any functional behavioral assessment and only addresses two disruptive behaviors. [AR Ex. 3] Petitioner's parents contend that instead of implementing a BIP in response to his behavior problems, the District began limiting his time in the general education classroom and increasing the time he spent in the special education classroom. The proposed IEP for Petitioner's fifth grade year also did not include a BIP, although a meeting was scheduled with District specialists to address Petitioner's behavior issues. Petitioner's parents assert that the District failed to adequately

address his disruptive behaviors which, in turn, prevented his access to education and impeded progress on his educational and functional goals and objectives.

As such, it is Petitioner's parents' position on appeal that the final IEP presented by the District in November of 2010 was not reasonably calculated to provide him with a FAPE, as it was not substantively different than his prior IEPs that failed to evidence progress on his educational/functional goals and, in turn, had failed to provide an appropriate education in the past. Moreover, despite his maladaptive and disruptive behaviors that prevented his ability to access education, the District failed to conduct a functional behavioral assessment, implement appropriate positive behavioral interventions, supports or strategies, or develop an appropriate BIP. Therefore, Petitioner's parents rejected the educational placement and IEP proposed by the District, and they unilaterally enrolled him at Firefly prior to the start of his fifth grade year.

II. PROCEDURAL HISTORY

Petitioner's parents claim the District failed to provide him a FAPE, as required by the IDEA, and so, they seek reimbursement for Petitioner's private school tuition expenses and the reasonable transportation costs incurred for his education at Firefly. After the District refused, they filed a due process complaint with the Colorado Department of Education. A due process hearing was held before an ALJ with the Colorado Office of Administrative Courts on June 6-8, 2012. The ALJ issued an Agency Decision

on July 9, 2012, in which she ruled in favor of the District by concluding that the District provided Petitioner with a FAPE and, as such, did not violate the IDEA.

Specifically, the ALJ found the evidence established that Petitioner made "some measurable progress" towards the academic and functional goals in his IEPs during the time that he was enrolled in the District, as well as on the IEP drafted for his fifth grade year. In so doing, the ALJ noted that the District's progress reporting was often minimal – in that many of the entries were lacking in detail or contained only conclusory statements about whether Petitioner was on target to meet the IEP goals and objectives – but concluded that "[w]hile the District's progress reporting could have been more robust and informative, the absence of more detailed reports does not amount to a substantive denial of a FAPE." Finally, the ALJ rejected Petitioner's parents argument that the District failed to comply with the IDEA by not performing the appropriate behavior assessments or implementing a BIP. As a result, the ALJ concluded that Petitioner and his parents did not meet their burden of establishing a claim for the costs of the Petitioner's unilateral private school placement under the IDEA.

Petitioner and his parents then initiated this action, pursuant to 20 U.S.C. § 1415(i)(2)(A), seeking review and reversal of the ALJ's Agency Decision, and requesting an order awarding them the costs associated with his education placement at Firefly incurred from May 10, 2010, through the present. They also seek an order requiring the District to

maintain Petitioner's placement at Firefly, at the District's expense, until such time as the District provides an IEP that is reasonably calculated to provide him with an FAPE as required by the IDEA.

III. IDEA

The IDEA is a federal statute that provides students with disabilities the right to a FAPE designed to meet their needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and annually revise an IEP that is calculated to meet the eligible student's specific educational needs. *Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1148-49 (10th Cir. 2008); 20 U.S.C. § 1414(d). Thus, the determination of whether a FAPE has been provided turns in large part on the sufficiency of the IEP for each disabled child. *Tyler V., ex rel. Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-1J*, 2011 WL 1045434 (D. Colo. 2011) (unpublished) (*citing A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 675 (4th Cir. 2007)).

Appropriate IEPs "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va.*, 516 F.3d 254, 257 (4th Cir. 2008); 20 U.S.C. § 1414(d). Challenges to the adequacy of an IEP can take two forms, i.e., arguments that the IEP was procedurally deficient or that it was substantively deficient. *Tyler V. v. St. Vrain Valley Sch. Dist., supra* (*citing Urban*

ex. rel. Urban v. Jefferson County Sch. Dist. R-1, 89 F.3d 720, 726 (10th Cir. 1996)); *see also* 34 C.F.R. § 300.513.

As relevant here, the IDEA provides for the reimbursement from a public school district when parents decide to enroll their disabled child in a private school without the consent of the school district. Parents are entitled to such reimbursement if: (1) the school district violated the IDEA; and (2) the education provided by the private school is reasonably calculated to enable the child to receive educational benefits. *Thompson R2-J Sch. Dist. v. Luke P., supra,* 540 F.3d at 1148; *see also* 20 U.S.C. § 1412(a)(10)(C)(ii) ("[i]f the parents of a child with a disability . . . enrolls the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if [it] finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment"); 34 C.F.R. § 300.148(c).

In this case, it is undisputed that the education provided by Firefly is reasonably calculated to enable the Petitioner to receive educational benefits. Thus, the sole issue is whether Petitioner and his parents have met their burden to prove that the District violated the IDEA by failing to provide Petitioner with a FAPE. To determine whether a FAPE was provided, the Court must ask whether the IEP was "reasonably calculated to enable [him] to receive educational benefits." *Thompson R2-J Sch. Dist. v. Luke P., supra,* 540 F.3d at 1148-49 (*quoting Bd. of Educ. v. Rowley,*

458 U.S. 176, 207 (1982)). "If the IEP was so calculated, the school district can be said to have provided a FAPE; if not, then not." *Id.* at 1149.

As the Tenth Circuit has noted, this standard is not onerous as "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make . . . access meaningful . . . [t]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1149 (*quoting Bd. of Educ. v. Rowley, supra*, 458 U.S. at 192, 198) (rejecting the proposition that Congress sought to guarantee educational services sufficient to "maximize each child's potential"). Rather, Congress sought only to require a "basic floor of opportunity" aimed at providing individualized services sufficient to provide every eligible child with "some educational benefit." *Thompson R2-J Sch. Dist. v. Luke P., supra* (*quoting Bd. of Educ. v. Rowley, supra*, 458 U.S. at 200); *see also Urban v. Jefferson County Sch. Dist. R-1, supra*, 89 F.3d at 727 (requiring that the educational benefit mandated by IDEA must merely be "more than *de minimis*"). Finally, because the question is only whether the IEP is reasonably calculated – not guaranteed – to provide some educational benefit, the measure and adequacy of an IEP can only be determined as of the time it is offered. *See Thompson R2-J Sch. Dist. v. Luke P., supra* (*quoting O'Toole ex rel. O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701–02 (10th Cir. 1998)).

IV. BURDEN & STANDARD OF REVIEW

The parties challenging the IEP bear the burden of persuasion to show it was deficient. *Tyler V. v. St. Vrain Valley Sch. Dist., supra* (*citing Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005)); *see also Jefferson County Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 798 F.Supp. 2d 1177, 1183 (D. Colo. 2011).

In determining whether they have met their burden, the Court "shall receive the records of the administrative proceedings;" "shall hear additional evidence" if requested by a party; and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2). "[T]hough the statute specifies that review is *de novo*, the Supreme Court has interpreted the requirement that the district court receive the administrative record to mean that 'due weight' must be given to the administrative proceedings, the fact findings of which are considered *prima facie* correct." *Thompson R2-J Sch. Dist. v. Luke P., supra,* 540 F.3d at 1150 (citation omitted). The Tenth Circuit describes this "somewhat unique standard of review" as a "modified *de novo* standard." *Id.* at 1149; *see also Tyler V. v. St. Vrain Valley Sch. Dist., supra.*

Thus, the District Court reviewing the final state administrative IDEA decision reviews questions of law *de novo. See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233, supra*, 144 F.3d at 698. Otherwise, when the administrative record is fixed, the District Court conducts a "modified *de novo*" review in that it "evaluate[s] the record, and determine[s] whether a

preponderance of the evidence indicates that the ALJ decision should be reversed." *Jefferson County Sch. Dist. R-1 v. Elizabeth E., supra,* 798 F.Supp. 2d at 1184.

In their reply brief, Petitioner's parents argue that I should afford the ALJ's Agency Decision, including her findings of fact, no weight at all because her decision was "entirely conclusory," it fails to substantiate her findings with reference to the evidence or citation to the administrative record, and it neglects to specifically evaluate conflicting evidence or make credibility determinations. However, they have provided me with no case law or authority supporting this argument. Furthermore, while I agree that the written decision lacks specific notation to the record, it contains all the relevant law and findings of fact necessary to support the ALJ's determinations. In fact, the decision is lengthy and quite thorough. While the ALJ does not specifically address credibility issues or the inconsistencies in the evidence, it is clear that she made such determinations in her findings.

Therefore, I reject Petitioner's parents' assertion that I should give no weight to the ALJ's decision. As discussed above, I review questions of law *de novo*, but I undertake a "modified *de novo*" review of the factual determinations in that I "independently review the evidence contained in the administrative record, accept and review additional evidence if necessary, and make a decision based on a preponderance of the evidence, while giving 'due weight' to the administrative proceedings below." *Murray v. Montrose County Sch. Dist. RE-1J,* 51 F.3d 921, 927 (10th Cir. 1995). In so doing, I note that I have

thoroughly read the entire adminstrative [sic] record, including the transcript from the adminstrative [sic] due process hearing, and I have based my decision on that record with due weight to the ALJ's determinations of the contested facts.

V. DISCUSSION

In their complaint, Petitioner's parents assert that the District's final proposed IEP (for his fifth grade year) was both procedurally and substantively insufficient to provide Petitioner with a FAPE in violation of 20 U.S.C. § 1414 (which provides processes for evaluating and implementing IEPs) and 20 U.S.C. § 1412 (which sets forth the District's obligation of providing a FAPE to children with disabilities). Petitioner's parents refer to: 1) the lack of past progress on the goals and objective in Petitioner's IEPs from 2007 through 2010 and, in turn, the inadequacy of the IEP proposed for his fifth grade year; 2) the District's failure to provide regular and meaningful reports to Petitioner's parents as to his progress; and 3) the District's failure to perform a functional behavioral assessment and develop an appropriate BIP for him. His parents contend that the lack of progress on Petitioner's IEPs, coupled with the failure of the District to provide reporting and behavior assessment/intervention, and a proposed IEP that was a continuation of that pattern, resulted in denial of a FAPE.

A. Lack of Progress on IEPs

Petitioner's parents first argue that his IEPs with the District reveal "an almost complete lack of progress" starting with the IEP for second grade and

continuing through the IEP proposed for his fifth grade year. They contend that over that three year period (his second, third and fourth grade years) Petitioner's educational records, as well the record on appeal as a whole, are "devoid of any demonstrable evidence that [he] made any measurable progress on the goals and objective contained in his IEPs." The District, in response, argues that while not always consistent or as robust as the IEP team would have hoped, Petitioner did in fact make educational/functional progress while enrolled in the District and under the IEPs developed for him.

The IDEA mandates that school districts provide IEPs for all eligible disabled students, "but then left the content of those programs entirely to local educators and parents, requiring only that they include 'a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum' and meet the child's 'other educational needs.'" *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1151 (*quoting* 20 U.S.C. § 1414(d)(1)(A)(i)(II)). As such, Congress established procedures to guarantee disabled students access and opportunity, not substantive outcomes. *Id.* (*citing Bd. of Educ. v. Rowley, supra*, 458 U.S. at 192, 197 n.21) (noting that Congress did not guarantee children "a potential - maximizing education," but rather some educational benefit). Although the controlling question is whether, going forward, the IEP proposed by the District was reasonably calculated to confer some educational

benefit, past progress on the IEP goals "strongly suggests" that when a proposed IEP is modeled on prior IEPs that had succeeded in generating some progress, the proposed IEP "was reasonably calculated to continue that trend." *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1153.

Petitioner's second grade IEP, beginning in May of 2007 and ending in May of 2008, contains six broad academic/functional annual goals, with several corresponding objectives. [AR Ex. 1] For example, it provides an annual goal that Petitioner will demonstrate basic language and communication skills, and then lists six short-term objectives employed to meet that goal such as that he will be able to express his desires and emotions when prompted, and he will make eye contact with peers and teachers with minimal prompting. In the discipline of language arts, an annual goal was that Petitioner will improve his writing skills. There are three listed objectives to this goal; for example, the first one is that given a detailed picture, Petitioner will write one complete sentence describing the picture independently. This objective contains a criteria: ("3) performs activity with verbal/gestural cues"), a baseline: ("0) does not participate"), and a method of measurement: ("Demonstration/Performance"). At the bottom of each objective, there is a section to record quarterly progress, with a place to indicate "Level" and the "Status," as well as make a comment. A progress key defines Level 1 as "skill/behavior is rarely or never demonstrated, therefore incomplete positive data is available," up to Level 4 which is that the "skill/behavior is generalized and transferred without

prompts and is above expectation of plan." Petitioner's second grade IEP contains twenty-six objectives, and each objective has a progress report only for the period ending in the beginning of November 2007. Each reporting is at a Level 2 ("skill/behavior is inconsistent with frequent prompts and is below expectation of plan") or Level 3 ("skill/behavior is consistent over time with few prompts and meets expectation of plan"), and the status is either left blank or "[w]ill be continued." [AR Ex.1] It is Petitioner's parents' assertion that no meaningful progress is recorded on his second grade IEP.

In his third grade IEP, for the period of April 2008 through April 2009, there are six annual goals, and twenty-three listed objectives. [AR Ex.2] This IEP provides, in essence, the same annual goals with adjustments in the implementing objectives. For example, for the goal of demonstrating basic language and communication skills, the second-grade objective is to "make eye contact with peers and teachers with minimal prompting," while the third grade objective is to "make and maintain eye contact with peers and adults" without prompting. The IEP for third grade does not show progress reporting for most of the objectives, but does indicate progress reporting for three periods for the objective "will use correct punctuation, capitalization and spacing in his writing" and the objective of "[g]iven a variety of coins and dollars, [Petitioner] will accurately count the money up to $5.00." At each period the status is "[w]ill be continued," and the Level is at 3 or, in the case of his use of punctuation, capitalization and spacing, he went down to a Level 2 as he "lost some independence in

remembering to use correct conventions in his writing." It is Petitioners parents' position that the objectives listed were merely carried over from the past year with little or no increase in difficulty resulting, in turn, in no measurable progress on Petitioner's academic goals. Petitioner's parents maintain that twenty-one of the twenty-six objectives identified in his second grade IEP were discontinued or abandoned in his third grade IEP because he was not able to make adequate progress on them.

In Petitioner's fourth grade IEP, for the period of April 2009 through April 2010, there are seven annual goals, and twenty-three listed objectives. [AR Ex.3] Again, the general goals are the same except for the addition of a self-advocacy goal of "[i]ncrease[d] independence," with implementing objectives such as "independently follow along with morning and afternoon routines of packing and unpacking his backpack" and "[u]sing a work system, [h]e will increase his independent worktime in a nonpreferred assignment." The objectives related to his continuing goals were again changed or modified. For example, the third grade IEP provides that "[g]iven a variety of coins and dollars, [Petitioner] will accurately count the money up to $5.00," and his fourth grade objective requires that he then will "hand over the correct amount." The objective of learning his multiplication facts "from 0-10" in third grade is amended to learning his multiplication facts "from 6-10." The IEP for fourth grade provides progress reporting for all four quarters, except in the areas of increased independence and improved social skills, which have reporting in only three quarters. Several of the objectives were deemed

at the end of the year to be "completed," while others were "modified," "will be continued" or "no longer appropriate." The objectives all went up from a Level 2 to a Level 3 (or remained at a Level 3 throughout the year) except in learning his division facts from 0-5 (where it was noted that the focus was changed to mastering multiplication), and in increasing his independent work time on a non-preferred assignment. His objective to respond with a relevant comment to others did not increase above a Level 2. His parents again claim that Petitioner's four grade IEP reveals that most of the objectives identified in his third grade IEP were likewise discontinued or abandoned because he was not able to make adequate progress.

In the initial IEP drafted for Petitioner's fifth grade year, for the period of April 2010 through April 2011, his overall annual goals were altered in the areas of self-advocacy and social interaction. [AR Ex. 4] The objectives not completed from his fourth grade IEP were continued (particularly in the area of math), and additional objectives were added to address his communication and basic language goal of "improv[ing] social communication skills in order to access the general education curriculum " as well as his new goals to "learn and utilize age appropriate coping strategies when feeling anxious and seek adult support when needed" and "participate in a developmentally appropriate job in an educational setting." Firefly used the goals and objectives in this draft IEP to assess Petitioner's status upon his enrollment in May of 2010, in order to determine his level of proficiency or progress on the objectives, based on the measurement criteria provided. [Transcript

Volume "TR" 2, pp. 238, 242-249, 293-94] By July 23, 2010, Firefly determined that Petitioner had mastered some of the draft IEP objectives, including all four language arts objectives, and was "keeping goal" as to most of the objectives that were not mastered, except in the communication and basic language skills objectives, which were amended. [AR Ex. 12]

The finalized IEP proposed by the District, dated November 16, 2010, provides essentially the same goals and objectives, except that his objectives for his social goals are increased and more clearly defined. [AR Ex. 5] For example, his objectives of utilizing age appropriate coping strategies and to participate in a developmentally appropriate job are redefined to focus on "learn[ing] and utilizing strategies to improve social interactions with adults and peers" and to "increase independence in an educational setting in order to demonstrate decreased anxiety." The majority of the implementing objectives contained more detail about how they would be carried out and measured, as well as information related to Firefly's observations and data as to Petitioner's current abilities to perform. For example, an objective to improve his social communication skills was changed from demonstrating two appropriate verbalizations during game play (simple board game, bingo, etc.) with at least one peer, to: "[g]iven a structured small group setting, [Petitioner] will demonstrate 2 appropriate verbalizations, following a model/prompt, during game play (simple board game, bingo, racing matchbox cars, etc.) with at least one peer." The checkpoint criteria remained the same (of more than or equal to 2 occurrences with less than or equal to 1 verbal

prompt), but additional information was added for measurement purposes ("[w]hen [Petitioner] engages in structured play with a peer, he will make at least two appropriate comments or questions directed at the peer and that are related to the situation"). In addition, his current status or ability to perform the objective, as observed at Firefly, was indicated (Petitioner "does verbalize during game play; however, his comments are often unrelated to the activity and are not directed at other people"). Parents contend that this finalized IEP constitutes a continuation of the prior pattern revealing no progress by Petitioner on his IEP goals and objectives. The finalized IEP was not accepted, and Petitioner remained enrolled at Firefly where a new IEP was implemented using, at least in part, the goals and objectives contained in the District's final proposed IEP from the District. [TR 2, pp. 298-306]

At the due process hearing, parents presented testimony from Anna Kroncke who completed a neuropsychological evaluation of Petitioner for his parents after he enrolled in Firefly in August of 2011. [AR Ex. 20] [TR 1, p. 125] Ms. Kroncke testified that she reviewed Petitioner's academic records from the District (including the goals and objectives in his IEPs), but she "wasn't able to determine measurable progress." [TR 1, pp. 138, 130, 154, 158-59, 162] She explained that the goals and objectives in Petitioner's IEPs were vague or hard to measure, and the the progress reports lacked quantifiable data. [TR 1, pp. 140, 144-49, 150-51] She concluded that it was her opinion that there was no evidence of academic progress. [TR 1, p. 165] On cross-examination, she

admitted that minimal progress data was noted (such as the level of progress or that an objective was completed), and that additional information was provided in narrative form, but that it was insufficient – in her opinion – to determine any academic progress. [TR 1, pp. 186-87, 193-94, 196-200]

Petitioner's special education teacher at Summit View, Amy Holton, testified that Petitioner's IEP goals from one year to the next were similar, but that the implementing objectives were changed to accommodate his progress and usually included an additional task or skill. For example, she testified that from his second grade IEP to his third grade IEP, Petitioner's writing objective was increased to add capitalization when working on correct punctuation and spacing. [TR 2, pp. 341-44] With regard to the proposed IEP for Petitioner's fifth grade year, she testified that the objectives were again modified to add skills, such as the ability to comprehend and follow directions from nonfiction (in addition to fiction) writing, in order to make progress on his broad annual goals. [TR 2, pp. 373-382] When reporting on Petitioner's progress, Ms. Holton testified that she used raw data from the classroom – such as her anecdotal notes, and data with percentages – in her "running log." Then, at the reporting periods, she would accumulate it and rate out his progress (via the level system) and indicate his status towards completion of the objective (usually as "continued" or, at the end of the year, "completed" if applicable). [TR 2, pp. 430-432] As the school year progressed, she usually rated his progress on an objective at Level 3, which meant that he has not completed or mastered

the objective, but that he was on the right course or trajectory to be able to complete the objective and in meeting the expectation plan. [TR 2, pp. 433-37] She testified that this reporting was adequate, consistent with District practice, and was discussed with parents at the annual IEP meeting. [TR 2, pp. 437-8, 440] Ms. Holton testified that it was her opinion that the objectives related to each goal were increased in each subsequent IEP. [TR 2, pp. 352-53, 360-61, 371-72]

The Director of Special Education for the District, Don Bell, testified that the District declined parents' request for reimbursement at Firefly because the District felt that it could provide Petitioner with a FAPE in the least restrictive environment at Summit View because his past IEPs had shown growth in his goals and objectives. [TR 3, pp. 482-3] He testified that the progress reporting in Petitioner's IEP met the required standard, although he admitted that he would have hoped to have seen additional entries. [TR 3, pp. 490-91] When specifically asked about the reporting in Petitioner's fourth grade IEP, he admitted that the progress on a language arts objective, as an example, contained "not as much [reporting] as I would like to see." [TR 3, p. 493] However, he further indicated that other places within the IEPs spoke to Petitioner's progress, and it was his opinion that the documents, when taken as a whole, provided sufficient information to assess his educational growth. [TR 3, pp. 493-94] On cross-examination, Mr. Bell indicated that the goals and objectives in the proposed fifth grade IEP from the District – in the draft IEP in May of 2010 and the final proposed IEP presented in November 2010 – were very similar and contained only

"some slight" changes in either criteria or the actual wording of the goal. [TR 3, pp. 488-89] He further testified that both Firefly and the parents, who had an opportunity to provide input, did not object to the fact that they were similar goals and objectives. [TR 3, p. 505]

Petitioner's mother testified that although Petitioner never achieved his academic potential, they did see some reading level improvements in third grade and some academic progress in fourth grade. [TR 1, pp. 71, 74, 96-97] With regard to the proposed fifth grade IEPs, however, she saw only a continuation of the past IEP pattern of no measurable increase in the goals and objectives required. [TR 1, p. 93]

My review of the record establishes that while the additions and modification in his IEP objectives from year to year – including the IEP proposed for his fifth grade year – did not reveal immense educational growth, they were sufficient to show a pattern of, at the least, minimal progress. For example, his math objectives related to money were modified as follows. In his second grade IEP the math objectives were: 1) given subtraction problems using numbers 1-12, he will use manipulatives to accurately solve the problem; 2) given addition problems, he will demonstrate adding whole numbers with regrouping with sums to 20; 3) he will identify and state the value of coins; and 4) given coins, he will accurately count to one dollar. [AR Ex. 1] In his third grade IEP the math objectives were: 1) given a variety of coins and dollars, he will accurately count the money up to $5.00; 2) he will understand time related vocabulary and concepts as it relates to the calendar; 3) when given a clock, he will

indicate the time shown on the face in quarter hours, five minutes and minute intervals; and 4) given a word problem, he will be able to identify which operation (addition, subtraction or multiplication) to use to solve the problem. [AR Ex. 2] In his fourth grade IEP the math objectives were: 1) given a variety of coins and dollars, he will accurately count money up to $5.00 and then hand over the correct amount counted; 2) when identifying an object he wishes to purchase, he will be able to answer the question "is that enough?"; 3) he will understand time related vocabulary and concepts as it relates to the calendar; 4) given an analog clock, he will be able to tell the correct time; 5) given a word problem, he will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem; 6) he will learn his multiplication facts 6-10; and 7) he will learn his division facts 0-5. [AR Ex. 3] And, in his final proposed fifth grade IEP the math objectives were: 1) given a variety of coins and dollars, he will accurately count money up to $5.00 and then hand over the correct amount counted; 2) when identifying an object he wishes to purchase, he will be able to answer the question "is that enough money?"; 3) given a word problem, he will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem; 4) he will learn his multiplication facts 6-12; and 5) he will learn his division facts 0-5. [AR Ex. 5]

While some of the objectives carried over from year to year, and some are only slightly modified, it is clear that the expectation in the objectives are increased over time. Petitioner's past IEPs revealed a pattern of

some progress on his education and functional goals, and that the proposed IEP for the fifth grade continues that pattern. *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d at 1153 (past progress on the IEP goals "strongly suggests" that when a proposed IEP is modeled on prior IEPs that had succeeded in generating some progress, the proposed IEP "was reasonably calculated to continue that trend"). I disagree with Petitioner's parents' argument that the modifications were insufficient to show any meaningful progress. Rather, I agree with the ALJ that Petitioner made progress towards his academic and functional goals in his IEPs and although this does not mean that he achieved every objective, or that he made progress on every goal, the evidence shows that he received educational benefit while enrolled in the District. As such, Petitioner's parents have failed to show that the District's IEPs – both past and proposed for the future – were not reasonably calculated to provide him with some educational benefit. *Thompson R2-J Sch. Dist. v. Luke P., supra*, 540 F.3d. at 1150 (whether a proposed IEP was reasonably calculated to enable a child to receive education benefits requires only a "basic floor of opportunity aimed at providing individualized services sufficient to provide every eligible child with some educational benefit").

B. Failure to Provide Progress Reports

Petitioner's parents also contend that they were not provided adequate progress reports as required by the IDEA. They argue that a failure to provide periodic progress reports can amount to a substantive violations of the IDEA which, in turn, denies parents

an opportunity to meaningfully participate in meeting to develop their child's IEP. In support of this argument, Petitioner's parents cite to *Escambia County Bd. of Educ. v. Benton*, 406 F.Supp. 2d 1248, 1273-74 (S.D. Ala. 2005), in which a District Court in the Southern District of Alabama deferred to the Hearing Officer's finding of adverse impact when the "dates of mastery are either excluded from IEPs or jotted in as a *pro forma* afterthought at year's end [as] the IEP team cannot determine the progress that the child has been making during the school year' towards achieving annual goals and whether adjustments to the program might be necessary." *Id.* The District, in response, concedes that the progress reporting on the IEPs in this case – especially on Petitioner's second grade IEP – was lacking in details, but argues that the reporting was sufficient to assess his progress. The District notes that there was constant informal communication between the school and the parents on Petitioner's progress, and there is ample evidence that Petitioner's parents participated in his education. The District contends that Petitioner's parent were aware of his progress, as evidenced by their role in modifying his IEP goals and objectives.

At the due process hearing, Petitioner's mother testified that she could not recall ever seeing or being provided with "any kind of quantitative data on either his progress or achievements with regard to his goals" beyond the reporting on his IEPs. [TR 1, pp. 68, 74, 85-88, 121] She also testified that the progress notes on the IEPs did not provide her with information about whether or not he was progressing towards completing the objectives. [TR 1, pp. 117-122] However, on cross-

examination she indicated that she did receive the IEPs for each year which indicated the goals and objectives, the level/measure of success on each goal, his current function with regard to that goal and where he was on the progress. [TR 1, pp. 100-04] She also testified that if she was confused about any reporting or information on the IEP, she had opportunities to ask for clarification both during the IEP meetings and in between, and that she had asked questions and provided input, but did not express any disagreement with the IEPs because she had hoped then [sic] would work. [TR 1, pp. 103, 110]

The record is clear that there was significant informal communication with the parents as to Petitioner's progress. [TR 1, pp. 72, 109] Petitioner's mother testified that she had regular communication with Ms. Holton in which she expressed her concerns about Petitioner's deteriorating behaviors and how that was, at least in part, overshadowing his academics. [TR 1, p. 55] In addition, Ms. Holton implemented a back-and-forth notebook with his parents in order to address behavior issues and report how Petitioner performed at school. [AR Ex. J] [TR 1, p. 55] [TR 2, pp. 384-5] Although Petitioner's mother testified that there was not much communication about his academic progress [TR 1, pp. 85-87], there is evidence that Petitioner's parents provided feedback about their concerns related to the educational/functional objectives in his IEPs. [TR 1, pp. 110-11, TR 2, pp. 358, 390-91] In April of 2009, Petitioner's mother provided significant input about her desired goals for his next school year including a breakdown of the academic and functional goals she

believed should be continued, modified, dropped or added. [AR Ex. G]

Furthermore, Ms. Holton testified that Petitioner's parents received a copy of the IEPs, including the notations of progress reporting, each year at the annual IEP meeting. She further testified that three times a year she reported on his progress on the IEP goals and objectives, which were copied and sent home with his report card in Petitioner's daily take-home folder in his backpack. In addition, she testified that she notified Petitioner's parent that the report card and IEP report would be coming home in case they got lost from Petitioner's backpack. [TR 2, pp. 408-411, 413] Finally, Ms. Holton testified that Petitioner's parents did not complain that the goals/objectives in IEPs where inappropriate [TR 2, p. 346], and they were made aware of his end-of-year progress (close-out reporting) with his IEP objective each year at the formal IEP meeting for next year. [TR 2, pp. 331, 476-77]

As a result, I reject the Petitioner's parents' argument that the record is "devoid of any written data or information about [his] work on or progress towards that goals and objectives contained in the IEPs" and that this "violates the IDEA and makes it impossible for [his parents] to participate in [his] educational programming in any meaningful way." First, as noted by the District, the IDEA requires only periodic reporting on the progress the student is making toward meeting his or her IEP annual goals, and while the IEP must contain description of when those reports will be provided, there are no specific legal requirements about the frequency or content of

the reports. *See* 34 C.F.R. § 300.320(a)(3) (IEPs require a description of how the child's progress will be measured, and when "periodic reports on the progress the child is making . . . will be provided). In addition, there is record evidence that Petitioner's parents received the quarterly IEP reporting which was sufficient for them to participate in the process as evidenced by their continued formal and informal communications about his progress. Although the IEPs in Petitioner's second and third grade years are missing many of the quarterly progress reports, and those included were conclusory as to whether he was on course of meeting the objectives, it is undisputed that progress was reported at the annual IEP meeting and that parents were in constant informal communication about his progress. Therefore, I find that Petitioner's parents have not met their burden to prove that the lack of progress reporting resulted in a denial of his FAPE.

C. Failure to Perform a Behavioral Assessment and/or Intervention Plan

Finally, Petitioner and his parents contend that the IEPs were deficient in that they failed to adequately address his behavioral problems because the District did not conduct a functional behavior assessment, or implement an adequate BIP. They argue that this failure resulted in an escalation of his disruptive behaviors, thereby preventing him from making any meaningful progress on his educational/functional goals and objectives in his IEPs and, as such, he did not receive a FAPE. The District asserts that the IDEA does not require either, except in circumstances not present here, as there is no

evidence in the record that Petitioner's placement was changed, or that he was removed for more than ten days, due to disciplinary actions. *See* 34 C.F.R. § 300.530(d)(1)(ii) (requiring an functional behavior assessment "as appropriate" when a student has been removed from a current placement for more than 10 days due to disciplinary infractions). Rather, the IDEA requires only that the IEP team consider interventions to address behavioral issues. 20 U.S.C. § 1414(d)(3)(B)(i) (in the case of a child whose behavior impedes the child's learning, the IEP team shall "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior"); *see also* 34 C.F.R. § 300.324(a)(2)(i). Moreover, the District asserts that Petitioner's second grade IEP did, in fact, include a BIP (as was found by the ALJ) [AR Ex. 1], as did his fourth grade IEP [AR Ex. 3], and that another behavior assessment and plan was in progress at the time Petitioner withdrew from the District and enrolled at Firefly. Finally, it notes that the record is clear that it regularly addressed behavioral issues, as they arose, with the cooperation of Petitioner's parents.

It is undisputed that Petitioner's behavioral issues interfered with his ability to learn. [TR 1, pp. 109, 138] [TR 2, pp. 254-59, 382-87] Ms. Holton testified that her interventions with Petitioner's escalating disruptive behaviors were not effective, but that she was in the process of addressing them with the District. [TR 2, pp. 387-89] After graphing patterns of Petitioner's behavior during his fourth grade year – such as the specific behavior, the circumstances, and the time of day – Ms. Holton testified that she was unable to

discern causation and, as such, scheduled a meeting with the District Autism Specialist and the Behavior Specialist. [TR 2, pp. 387-389, 391-93, 461, 464] Ms. Houston testified that by the time they drafted Petitioner's IEP for his fifth grade year, they had scheduled a separate behavior meeting to address and change Petitioner's behavior plan. [TR 2, 382-83] Although this meeting with the specialists did not occur, because Petitioner had previously withdrawn from the District, the IEP team met to document their data and to formulate an initial plan regarding Petitioner's behavioral issues. [TR 2, p. 393] [TR 3, pp. 465-68] [Ex. F] On cross-examination, Ms. Holton testified that she was not aware, aside from her anecdotal classroom data, if other behavioral data was collected by the District in order to create either a BIP for Petitioner. [TR 3, 449-452]

I agree with the District that the record reveals that it was addressing Petitioner's behavioral issues, in order to allow him better access to education, and that Petitioner's parents were involved in the management thereof. Whether or not the District failed to conduct a functional behavioral assessment or implement a BIP in this case, at any particular or specific time, is mainly irrelevant to this decision as the Petitioner does not dispute that the IDEA does not require such assessment or plan. Rather, I am to determine whether the District's approach to managing Petitioner's behavior, in order to allow him to effectively learn, failed to provide him with a FAPE. The evidence of record is that the District was, at the very least, addressing Petitioner's behavioral issues and that a new behavior plan was deemed necessary

and was in progress at the time that Petitioner withdrew from the District. As a result, I find that despite the District's inability to manage Petitioner's escalating behavioral issues at the time of his withdrawal, it was in the process of reassessing his BIP in order to address the issue. As such, Petition has not met his burden of proving that his was denied a FAPE.

VI. CONCLUSION

Because Petitioner and his parents have failed to meet their burden to prove that the District violated the IDEA by failing to provide Petitioner a FAPE, they are not entitled to reimbursement of his tuition and transportation costs to attend school at Firefly under 20 U.S.C. § 1412(a)(10)(C)(ii) and 34 C.F.R. § 300.148(c).

ACCORDINGLY, for the foregoing reasons, I AFFIRM the Administrative Court Agency Decision.

Dated: September 15, 2014, in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

APPENDIX C

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, Colorado 80202	^ COURT USE ONLY ^
[Father] and [Mother] on behalf of [Student], a minor, Complainants, vs. DOUGLAS COUNTY SCHOOL DISTRICT RE 1, Respondent.	CASE NUMBER: EA 2012-0006 [filed July 9, 2012]

AGENCY DECISION

On February 21, 2012 the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint filed by [Parents] ("the parents") on behalf of their minor child, [Student], alleging that the Douglas County School District RE 1 ("District") had denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), its implementing regulations at 34 C.F.R. § 300.511, and Colorado's Exceptional Children's Educational Act ("ECEA"), 1 CCR 301-8. The complaint was forwarded to the Office of Administrative Courts and assigned to Administrative Law Judge ("ALJ") Michelle A. Norcross for an impartial due process hearing. Hearing was held in

Denver, Colorado on June 6 – 8, 2012.[1] The parents were represented by Jack D. Robinson, Esq. The District was represented by Robert Ross, Esq. At hearing, the ALJ admitted into evidence Complainants' exhibits 1 – 25, and District's exhibits F – J. The proceedings were recorded in courtroom 2.

ISSUES PRESENTED

Whether the District failed to provide [Student] with a free appropriate public education ("FAPE") as required by the Individuals with Disabilities Education Act ("IDEA"); and, whether the District is responsible for tuition reimbursement and travel expenses related to [Student]'s unilateral private school placement.

FINDINGS OF FACT:

Based on the evidence in the record, the ALJ finds the following:

1. [Student] is a [age]-year old [gender] who was born on [date]. [Student] was diagnosed with autism at the age of two. In 2003, [Student] was also diagnosed with Attention Deficit/ Hyperactivity Disorder.

2. [Student]'s disabilities impact [Student's] cognitive functioning, language and reading skills, as well as [Student's] social and adaptive development.

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[1] The hearing was originally scheduled for April 23 – 25, 2012. At the request of the parties, on April 18, 2012, the hearing was continued to June 6 - 8, 2012 and the decision deadline was extended beyond the 45-day time limit provided in state and federal regulations to June 22, 2012. Per the request of counsel, the decision deadline was further extended to July 16, 2012 to allow for the filing of post-hearing briefs.

[Student] is unable to engage in age-appropriate socialization and is not always able to express [Student's] needs or wants. [Student] plays well independently but generally does not approach or engage in play with other children. [Student] becomes frustrated and anxious when [Student] is challenged or is around a feared stimulus, which includes dogs, flies, spilled liquids, airports and airplanes, and public restrooms.

3. When [Student] becomes anxious or agitated, [Student] has difficulty calming down on [Student's] own. For the past several years, [Student] has engaged in the following disruptive and self-harming behaviors when agitated or anxious: climbing over classroom furniture, walls, and other students, hitting objects, yelling, screaming, kicking, head banging, running away and has twice taken off all [Student's] clothing and urinated and defecated in the classroom.

4. [Student] started preschool in the Douglas County School District RE-1, where [Student] was qualified to receive special education services and had an individualized education program ("IEP").

5. [Student] was enrolled in the District's preschool program for three years. In 2005, at the age of [age], [Student] advanced to the half-day kindergarten program at [School #1].

6. Preschool went well for [Student]. When [Student] entered preschool [Student] spoke only a few single words but was speaking in phrases and sentences by the time [Student] entered kindergarten. Kindergarten was also successful. [Student's] social interactions were improving and [Student] enjoyed

attending school. [Student] was placed in the general education kindergarten classroom and continued to receive special education and related supports and services, including speech therapy, occupational therapy and social skills supports outside of school.

7. After completing kindergarten, [Student] remained at [School #1], where [Student] attended full-day first and second grades in 2006 and 2007, respectively. During these years, [Student] was also placed in the general education classroom. [Student] continued to receive pull out special education and related supports and services. At this time, [Student] was receiving 20 hours per week of speech therapy, occupational therapy, group and individual therapy and social skills interventions. [Student] was also assigned a full-time paraprofessional to help keep [Student] on task and to help deescalate [Student's] disruptive behaviors.

8. Neither party produced [Student]'s 2005 or 2006 IEP. The first available IEP is [Student's] 2007 IEP. [Student]'s 2007 IEP includes several academic and functional goals, short-term objectives, as well as a behavioral intervention plan ("BIP"). The IEP also contains several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. In this year, [Student] was to be inside the general education classroom between 40% and 79% of the day. [Student] spent the rest of the day in the special education classroom.

9. Through first and second grade, [Student] was progressing academically. [Student] was meeting several of the goals and objectives in [Student's] IEPs and developing limited social skills. Sometime during [Student's] second grade year, [Student]'s behavioral problems began increasing. [Student] started having more frequent tantrums in class, which included yelling, crying and dropping to the floor, running out of line during class transitions; and, on occasion urinating in [Student's] pants. [Mother] had several conversations with [Student]'s special education teacher at the time trying to find a solution to [Student]'s disruptive behaviors.

10. The parents had had some success redirecting [Student]'s behaviors at home using a timer. The timer worked in the classroom for a short while but ultimately created bigger problems as it became an obsession for [Student]. When [Student] was denied access to the timer in [Student's] classroom, [Student] would leave class in search of another timer and when [Student] found one [Student] would disrupt that classroom, crawling over other students, desks, and chairs to get to the timer.

11. The problem behaviors noted by both [Student's] teacher and [Student's] parents are documented in [Student's] BIP. Recognizing that [Student] responded more favorably to rewards for positive behavior than consequences for negative behavior, the plan outlined ways to redirect and reward [Student]. The BIP incorporates rewards for good behavior (e.g. computer time), picture cards to redirect [Student] back on task, and transporting [Student] to another classroom where [Student] could

engage in self-calming behaviors like swinging or listening to music with the lights turned off. It also included use of District-approved restrain procedures if [Student] was in danger of hurting [him/her]self or others.

12. [Student] remained at [School #1] until [Student's] third grade year when [Student] was transferred to [School #2]. [School #2] is [Student]'s neighborhood school, but at the time [Student] was enrolled in the District, [School #2] did not have a significant support needs ("SSN") classroom. When the SSN classroom was completed at [School #2], [Student] and [Student's] classmates were transferred to [School #2].

13. The transition to [School #2] from [School #1] was difficult for [Student]. [Student's] behavioral problems continued. Throughout the year, [Student's] social skills had declined and [Student] was engaging in all types of avoidance behaviors, such as dropping to the floor, yelling, crying and urinating in [Student's] pants. [Student] did not want to go school.

14. [Special education teacher] was [Student]'s special education teacher at [School #2]. She worked with [Student] at [School #1], but was not [Student's] classroom teacher until third grade. Similar to [Student's] other years in the District, for third grade, [Student] was placed in the general education classroom with support from a paraprofessional. [Student] continued to receive special education and related services in the self-contained SSN classroom.

15. [Special education teacher] and the parents used a back-and-forth notebook to communicate how [Student] was doing at home and in school. The entries confirm the increase in [Student]'s disruptive behaviors. Academically, [Student] was making progress towards some of [Student's] goals and objectives during [Student's] third grade year, but [Student's] behaviors were beginning to interfere with [Student's] educational opportunities.

16. Prior to each IEP meeting and on a quarterly basis throughout the years [Student] was at [School #2], [special education teacher] provided the parents with progress updates regarding [Student]'s performance. The District's IEPs have a section under each objective for documenting [Student]'s progress towards [Student's] annual goals. Some of the objectives contain little or no progress reporting; however, most contain at least conclusory statements about whether [Student] was on track to meet the expectations of the plan and whether the objective had been completed or would be continued.

17. The goals in [Student]'s 2008 IEP are similar, if not identical, to the goals in [Student's] 2007 IEP; however, most of the objectives and criteria in the 2008 IEP were modified to account for [Student]'s progress toward those goals.

18. In the spring of 2009, the IEP team scheduled a meeting in April 2009 to develop [Student]'s 2009 IEP.

19. Prior to the April 2009 IEP meeting, [Mother] provided her desires to the team regarding [Student]'s goals for the next school year, which included:

[Student] spending more time in the general education classroom, increasing [Student]'s reading and writing skills, increasing [Student's] social interactions with peers, and decreasing [Student's] dependence on a paraprofessional.

20. [Mother] also requested that 4 of the 5 reading goals in [Student]'s 2008 IEP be maintained and carried over to [Student's] 4th grade IEP. She also requested that several of the math, writing and social skills goals be maintained but with more specific objectives.

21. [Student]'s 2008 and 2009 IEPs contain several academic and functional goals, short-term objectives, as well as several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. Again, [Student] was to be inside the general education classroom between 40% and 79% of the day and receiving pull out special education and related services the remainder of the day.

22. [Student]'s 4th grade year at [School #2] started off very rocky. [Student] did not want to attend school and [Student's] tantrums started increasing in both severity and frequency. There were times when [Student] had to be removed from the classroom because [Student] was crawling under desks, slapping the computer screen, or being disrespectful to [Student's] peers by messing with their work or desk. Other noted areas of concern were [Student]s' tendencies to wander out of the room without supervision and run out of line before school when the class was lining up for the bell to ring. And, on at least

two occasions in school year 2009, [Student] became so upset and agitated that [Student] ran from school and when [Student] returned [Student] took off all [Student's] clothing and urinated and defecated on the classroom floor.

23. [Mother] had many conversations that year with [special education teacher] and [Student]'s social worker to find a solution to [Student]'s increasing behavioral problems. Everyone was working together to solve the problem but [Student]s' problem behaviors continued. By spring of 2010, [special education teacher] suggested that the IEP team bring in an autism specialist.

24. Despite the increase in [Student]'s problem behaviors, during school year 2009 [Student] was still making some progress towards [Student's] academic and functional goals.

25. The start of the 2010 school year was much the same as the 2009 school year. The parents continued to express their concern to [Student]'s teachers and the IEP team regarding [Student]'s behaviors, elopements and lack of social progress. There is no persuasive evidence that prior to that point the parents complained to the administration about any concern they had regarding [Student]'s academic progress or lack thereof.

26. With input from the parents, on April 13, 2010 the IEP team drafted a new IEP for [Student]. Similar to [Student's] prior IEPs, the annual goals in [Student]'s 2010 IEP are nearly identical to those in [Student's] 2009 IEP. The difference between the two

programs appears in modifications that were made to the objectives and the measuring criteria.

27. [Student]'s April 2010 IEP contains several academic and functional goals, short-term objectives, as well as several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. This year, [Student] was to be inside the general education less than 40% of the day and receiving pull out special education and related services the remainder of the day.

28. When the IEP team met in April 2010, [social worker], a licensed social worker, noted that [Student]'s classroom behaviors were, at times, inhibiting [Student] from accessing academic learning as well as social learning. And that when [Student] exhibits these behaviors [Student] typically does not stop until [Student] wears [him/her]self out.

29. Everyone was in agreement that a new BIP was needed and that an autism specialist should be part of the team. A behavior plan meeting was scheduled for May 10, 2010 and a draft BIP was prepared by the District. The parents did not attend the May 10 meeting.

30. On May 1, 2010 the parents notified [Director], Director of Special Education for the District, in writing of their intent to withdraw [Student] from [School #2] and place [Student] at the private [Private School] (now [Private School's new name]). In the letter the parents expressed their concerns regarding the lack of academic and social progress [Student] was making at [School #2]. They informed [Director] that

they were obtaining academic and functional performance evaluations and would be seeking tuition reimbursement from the District.

31. On May 19, 2010 [Director] responded requesting that the team convene another IEP meeting as soon as possible to discuss the family's concerns. [Director] also requested copies of [Student]'s academic and functional performance tests for the IEP team to consider the information and determine if additional evaluative data would be necessary and/or appropriate.

32. When [Director] wrote the May 19, 2010 letter to the parents he was unaware that [Student] had already been withdrawn from [School #2] on May 7, 2010. In light of the new information, [Director] told the parents that if they decided to reenroll [Student] in the District, the District would convene an IEP meeting as expeditiously as possible and stand ready to serve [Student].

33. Despite the fact that [Student] was now attending [Private School], the District went ahead with the May 10 meeting and developed a new BIP for [Student], which remains in draft form but was shared with the staff at [Private School].

34. [Student] began classes at [Private School] on May 10, 2010. [Student] was placed in the [ ] classroom.

35. [Private School] specializes in working with autistic students to help them acquire skills for independence in the school and community settings as well as improve social interactions and social learning.

36. At [Private School], [Student] has a 1:1 student to teacher ratio and is one of eight special needs students in [Student's] class. Aside from occasional field trips, [Student] does not engage with non-disabled children during [Student's] school days at [Private School].

37. Each day the [Private School] classroom staff collects data on each student's IEP objectives to assess progress. The raw data is compiled and graphed, charting each student's progress. [Student]'s progress reports from [Private School] are quite extensive and contain documented, detailed, daily information about [Student's] progress.

38. When [Student] came to [Private School], the only IEP [Student] had was the one that was developed by the District on April 13, 2010. [Private School] chose not to develop a new IEP for [Student] until they had had a chance to observe and evaluate [Student]. The [Private School] staff spent the first six to eight weeks following [Student]'s enrollment observing [Student]. Between May 12, 2010 and August 1, 2010 the staff at [Private School] observed and collected data on [Student].

39. [Student]'s disruptive behaviors that were observed and documented by [Private School] are the ones previously identified by the District and are addressed in the District's May 2010 draft BIP, which include dropping, eloping, climbing, loud vocalization, crying, property destruction, verbal and physical aggression, self-injurious behavior, and perseverative language.

40. In July 2010, the [Private School] staff tested [Student] on the goals and objectives in the District's April 13, 2010 IEP, using the same measurement criteria developed by the District's IEP team. The [Private School] team concluded that [Student] had mastered many of the objectives in the April 13, 2010 IEP, including 4 language arts objectives, one physical objective and one inter- intra-personal objective.

41. With the participation of the [Private School] IEP team and the parents, the District convened another IEP meeting on November 16, 2010. Many of the same goals in the April 13, 2010 IEP were incorporated into the District's November 16, 2010 IEP but again the objectives and criteria had been modified to reflect [Student]'s academic progress. The parents rejected the District's November 16, 2010 IEP and elected to keep [Student] enrolled at [Private School]. [Student] remains at [Private School] and [Student's] parents are seeking tuition reimbursement from the District.

42. The District is responsible for providing [Student] with a FAPE. If it fails to do so, it may be responsible for paying the cost of private placement elsewhere.

43. In this case, the ALJ finds that the credible and persuasive evidence establishes that [Student] made progress towards [Student's] academic and functional goals in [Student's] IEPs during the time [Student] was enrolled in the District and that the District was providing a FAPE. This does not mean that [Student] achieved every objective in [Student's] IEPs or that [Student] made progress on every goal,

but the evidence shows that [Student] received some educational benefit while enrolled in the District.

44. The District provided ongoing progress reporting to the parents consistent with the quarterly reporting it provided to other parents of students who received report cards. The District also provided the parents with an opportunity to fully participate in the drafting of [Student]'s IEPs.

45. The credible and persuasive evidence further establishes that the District's April 13, 2010 IEP goals are clear and measurable. They are supported by short-term objectives, all of which contain measuring criteria and baseline functioning. This fact is supported by the testimony of the [Private School] witnesses who testing [Student]'s performance on the April 13, 2010 goals.

46. Shortly after [Student] was enrolled at [Private School] the staff concluded and it is found as fact that [Student] had made progress towards and even mastered several of the objectives in the District's April 13, 2010 IEP. [Private School] was able to draw these conclusions by relying on the goals, objectives and criteria in the District's IEP.

47. There is no question that [Student] has made progress at [Private School] particularly in reducing [Student's] anxieties and conquering some of [Student's] fears. The [Private School] team has developed specific programs targeted to address [Student]'s anxieties around using public restrooms, reacting to spills, riding in airplanes and encountering dogs. Of particular note, recently, [Student] was able to access the airport and board a plane with

[Student's] family for a family vacation. [Student] has also been able to use public restrooms with much less anxiety. But the fact that [Student] was making greater behavioral progress at [Private School] does not mean that [Student] was not receiving a FAPE at [School #2].

48. [Student]'s compulsions and avoidance behaviors can and have interfered with [Student's] learning. [Student's] behavioral problems began to escalate in 2008 and became so severe in 2010 that the District sought help from an autism specialist. A new BIP was drafted, but never implemented because [Student] was no longer enrolled in the District at the time it was created. If [Student] returns to the District, it is clear that [Student] needs a well-developed BIP to ensure that [Student's] behaviors do not impeded [Student's] educational opportunities.

49. Although the District was unable to find a long-lasting solution to [Student]'s increasing behavioral problems prior to May 7, 2010, the ALJ finds that the District worked collaboratively with the parents and other service providers to address [Student]'s behaviors as they arose.

DISCUSSION

The IDEA was enacted to ensure that all children with disabilities have access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") is defined as "special education and related services . . . provided in conformity with an individualized education program."

20 U.S.C. § 1401(9). The individualized education program ("IEP") is the basic mechanism through which the school district's obligation of providing a FAPE is achieved. *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). The local school district is required to develop, implement and annually revise an IEP that is calculated to meet the student's specific needs and educate that student in the "least restrictive environment", meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public school classrooms alongside children who are not disabled." 20 U.S.C. §§ 1414(d) and 1412(a)(5)(A).

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke*, 540 F.3d 1143, 1148 (10th Cir. 2008). It is determined that a school district has provided a disabled student with a FAPE when demonstrable evidence from the student's educational records establishes that the student made some measureable progress on the goals and objectives in [Student's] IEP. *Id.* In this case, since the parents are seeking private school tuition reimbursement, they have the burden of establishing that the District's educational plan was not reasonably calculated to provide [Student] to some educational benefit.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase "free appropriate public education". In that decision the Court held that the statutory definition of FAPE

requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children; the school district's obligation extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit *id.* at 200.

Individualized Education Program

In order to comply with the requirements of the IDEA, a school district shall insure that each handicapped child's educational placement: Is determined at least annually; is based on his or her IEP; and is as close as possible to the child's home. See 20 U.S.C. § 1412(5)(B). The IEP consists of a written document containing:

(A) a statement of the present levels of educational performance of such child;

(B) a statement of annual goals, including short-term instructional objectives;

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;

(D) the projected date for initiation and anticipated duration of such services; and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

The parents argue that the District's April 13, 2010 IEP was deficient and not reasonably calculated to provide [Student] an appropriate education. They state that they rejected the April 13, 2010 IEP because [Student] had made little to no progress on [Student's] goals and objectives over the past few years and that the April 13, 2010 IEP provided no substantive change from the previous years' IEPs. The parents assert that the increasing gaps in [Student]'s education were becoming more pronounced and even evidencing regression. The parents also argue that the goals in the Districts IEPs over the years were too vague to be measured, that they were not, in fact, measured and that the IEPs lacked adequate data on [Student]'s progress. For the following reasons, the ALJ is not persuaded by the parents' arguments.

It is true that most, if not all, of the annual goals in [Student]'s IEPs between 2007 and 2010 are the same or similar. Each IEP contains several language arts, math, communication and basic language skills, physical and self-advocacy/self-determination goals. The goals are generally defined, but they are not so broadly written as to be vague. By way of example, one of the continued language arts goals is, "the student will improve writing skills as measured by the

following objectives:"; and, one of the continued math goals is, "the student will communicate an understanding of number sense as measured by the following objectives:" The District's IEP team recommended continuing [Student]'s annual goals from year-to-year because they remained an appropriate component of [Student's] educational plan. And, while the goals remained the same, the objectives and the measuring criteria changed from year-to-year taking into account [Student]'s progress. As [Student] progressed, the objectives were modified or replaced with new objectives and/or the measuring criteria were modified to reflect a higher level of expectation. Sometimes [Student] did not make progress towards [Student's] goals and in those instances the team recommended continuing the objective to the following year.

The IDEA does not guarantee outcomes and an IEP does not have to provide the best conceivable education. The IDEA is designed to provide a floor not a ceiling. An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-7. The goals and objectives in [Student]'s April 13, 2010 IEPs are both clear and objectively measurable and [Student] was making progress towards those goals. The most persuasive evidence of this came from the [Private School] witnesses. Shortly after [Student]'s enrollment at [Private School], in July 2010, [Private School] used the District's goals, objectives and criteria in the April 13, 2010 IEP to evaluate [Student]'s academic and

functional performance. The [Private School] staff concluded that [Student] had made progress towards and/or mastered several of the goals/objectives in [Student's] IEP. [Private School] also adopted several of the District's goals and objectives, some with modifications, into its own IEP later that fall. Both the District's and [Private School]'s educational records show that [Student] was making some measureable progress on the goals and objectives in [Student's] April 13, 2010 IEP.

The parents are also critical of the lack of progress reporting contained in the IEPs. In this regard, the ALJ finds some merit in their argument. The 2006 IDEA Part B regulations require that every IEP include a description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 C.F.R. 300.320 (a)(3).

The IEPs produced in this case contain some information in the progress reporting section about [Student]'s progress, but many of the entries are lacking in detail or contain only conclusory statements about whether [Student] was on target to meet the goal. Even [Director], the District's Director of Special Education, stated that he would have liked to have seen a little more substantive information in the progress reporting sections. That being said, however, it is the IEP team, not IDEA regulations that determine the frequency and content of the reports. 34 C.F.R. 300.320 (a)(3)(i).

In addition to the progress reporting information in the IEPs, [special education teacher] testified that she sent home periodic reports regarding [Student]'s progress throughout the year. [Mother] stated that she did not remember receiving any such reports; however, she did state that she was provided with copies of [Student]'s draft IEPs prior to each year's IEP meeting. There is no reason to believe [special education teacher] did not do as she stated nor is there any reason to believe that the parents did not receive any such reports. The fact remains, however, that the parents were provided all of [Student]'s draft IEPs prior to each meeting, were in constant communication with [special education teacher] either through face-to-face meetings or the back and forth notebook, and were able to meaningfully participate with the District in directing [Student]'s education.

Failure to comply with the progress reporting practices of the IDEA can amount to a substantive denial of FAPE or a procedural violation that may or may not deny FAPE. In *Beaverton School Dist.*, 30 IDELR 740 (SEA OR 1999), it was determined that a district's failure to provide a parent with a student's periodic reports was a procedural violation that did not constitute a denial of FAPE because the student continued to receive appropriate services and it did not deprive the parent of meaningful participation in directing her child's education. In the instant case, the ALJ concludes the same. While the District's progress reporting could have been more robust and informative, the absence of more detailed reports does not amount to a substantive denial of a FAPE.

Behavioral Intervention Plan

The parents contend that the District failed to comply with the IDEA by not performing a functional behavioral assessment ("FBA") in order to develop a behavior plan to address [Student] increasing problem behaviors. A behavioral intervention plan ("BIP") is a set of interventions, supports and strategies designed to assist a student whose behavior impedes [Student's] own learning or the learning of others. 34 C.F.R. 300.324 (a)(2)(i). The IDEA requires districts to consider the need for a BIP when a student exhibits problem behavior, but it does not mandate the BIP's format or contents. Districts have broad discretion in developing BIPs, which are to be done on a case-by-case basis, taking into account the particular student's behavioral needs. 34 C.F.R. 300.530 (a).

There is no dispute that, at times, [Student]'s behavioral problems interfered with [Student's] learning process. [Student] has exhibited disruptive classroom behaviors since, at least, 2007. [Student]'s 2007 IEP contains a BIP, which remained part of this IEP in the following years. [Student]'s problem behaviors began increasing in frequency and duration when [Student] transferred from [School #1] to [School #2] but [Student] did not start engaging in more severe self-harming behaviors until 2009. At that time, both the District and the parents had multiple discussions about what to do, including bringing in an autism specialist. By the spring of 2010 and based on observations of the school's social worker, [social worker], the IEP team took steps to modify [Student]'s BIP. A behavior plan meeting was scheduled for May 10, 2010 and a new draft BIP was prepared by the

District. The parents did not attend the May 10 meeting, however, as they had already made the decision to remove [Student] from [School #2] and enroll [Student] at [Private School].

The record does not establish whether the District performed a FBA either prior to implementing [Student]'s 2007 BIP or thereafter. However, a failure to do so would not necessarily violate the IDEA. Neither a FBA nor a BIP are required components of an IEP. 34 C.F.R. 300.320. And the only time the a district is required to perform a FBA is when the district, the parent(s) and member of the IEP team determine that a student's conduct – the conduct giving rise to a change in placement (i.e. removal for 10 or more consecutive school days or a series of removals that constitute a pattern) - was a manifestation of the student's disability. 34 C.F.R. 300.530(f). [Student]'s change in placement was a unilateral one made by [Student's] parents based on an allegation that the District failed to provide a FAPE. The change in placement at issue in this proceeding does not trigger the mandatory FBA requirements of 34 C.F.R. 300.530(f). Therefore, any failure on the part of the District to perform a FBA does not violate the IDEA.

Least Restrictive Environment

In addition to providing personalized instruction for a handicapped child, a state must comply with the IDEA's requirement that this personalized instruction be provided in the least restrictive environment ("LRE"). In order to do so, a state must adopt:

> [P]rocedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B) (Supp. 1991).

Under Colorado law, each public agency must ensure that—

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
>
> Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

1 CCR § 301-8, 2220-R-5.02; 34 C.F.R. 300.114 (a)(2)(i) and (ii).

In *L.B. v. Nebo Sch. Dist.*, 379 F.3rd 966, 978 (10th Cir. 2004), the parents of a child diagnosed with

autism, unilaterally removed their child from the Nebo School District and placed her at their own expense in a private preschool. Although the student's parents generally agreed with the goals in Nebo's proposed IEP, they disagreed with Nebo's proposal to place their child at Park View. Park View is a special education preschool populated primarily by disabled students, but includes thirty to fifty percent typically developing children who interact throughout the school day with the disabled children. Following the due process hearing, the hearing officer found that Nebo did not violate the LRE requirement and that Appellants had failed to present evidence that the student was progressing on her IEP at the private preschool. *Nebo* at 973. Appellants challenged that finding on appeal. The Tenth Circuit Court concluded that Park View was not the student's least restrictive environment. *Id.* at 975.

In its decision in *Nebo*, the court held:

> In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). . . Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. (citing *Murray v. Montrose County Sch. Dist.*, 51 F3d 921, 926 (10th Cir. 1995)). Thus, the LRE requirement is a specific statutory mandate. It is not, as the district

> court in this case mistakenly believed, a question about educational methodology.

Nebo at 976.

In the instant case, the evidence shows that the District developed, implemented and annually revised an IEP that was calculated to meet [Student]'s specific needs and educate [Student] in the least restrictive environment. The ALJ concludes that [Student]'s placement at the District complies with the LRE mandate of the IDEA.

CONCLUSIONS OF LAW

1. A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 C.F.R. 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 CFR 300.513 (a)(2)(i) – (iii).

2. District developed, implemented and annually revised an IEP that was calculated to meet [Student]'s specific needs and educate [Student] in the least restrictive environment.

3. The District's April 13, 2010 IEP contained goals and objectives that were reasonably calculated for [Student] to receive educational benefit.

4. [Student] made some academic progress towards the goals in [Student's] April 13, 2010 IEP while [Student] was enrolled in the District.

5. The District offered [Student] a FAPE as required by the IDEA.

DECISION

A local education agency (LEA) is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a FAPE available to the child and the parents elected to place the child in a private school or facility. 34 CFR 300.148 (a). The ALJ concludes that the Complainants have not met their burden of establishing a claim for tuition reimbursement or related travel expenses associated with the costs of [Student]'s unilateral private school placement.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

DATED AND SIGNED

July ____, 2012

MICHELLE A. NORCROSS
Administrative Law Judge

APPENDIX D

FILED
United States Court of
Appeals Tenth Circuit
September 24, 2015
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ENDREW F., a minor, by and through his parents and next friends, JOSEPH F., and JENNIFER F., Plaintiffs-Appellants, v. DOUGLAS COUNTY SCHOOL DISTRICT RE-1, Defendant-Appellee.	No. 14-1417

ORDER

Before **HARTZ**, **TYMKOVICH**, and **PHILLIPS**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is also denied.

Entered for the Court

Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk